148 U.S. 107

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 7, Original.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA, PETITIONER.

RETURN TO RULE.

FILED NOVEMBER 29 1892.

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RETURN TO RULE.

1 Supreme Court of the United States—October term, 1892—Original docket No. 7.

EX PARTE THE COMMONWEALTH OF VIRGINIA.

The answer and return of John Paul, judge of the district court of the United States for the western district of Virginia to the rule on him laid by this honorable court to show cause why the writ of mandamus should not issue commanding him, as a judge entitled to hold the circuit court of the United States for the said district, to remand the case of the Commonwealth of Virginia v. Joseph H. Carrico, now pending in said court, to the county court of Smythe County, Virginia, and to restore the body of the said Joseph H. Carrico to the custody of the jailer of said county.

This respondent answering, saith that he is the district judge of the district court of the United States for the western district of Virginia, and that on or about December 18, 1891, the said Joseph H. Carrico, by his counsel, applied to him, in chambers, for a writ of habeas corpus commanding W. D. Wilmore, the jailer of the county of Smythe, Virginia, to bring the body of the said Carrico before this respondent with the day and cause of the capture and detention thereof; that the petition containing the said application was addressed to the "Hon. John Paul, judge of the United States circuit court," and alleged that the petitioner had been arrested and committed to the said jail of the county of Smythe by virtue of a warrant issued by one Kirk, a justice of the peace of the said county, for the alleged murder of a certain James Nelson; that the killing of said Nelson was no murder, but an act done in the necessary defense of the petitioner's own life in the performance of his duty as a deputy marshal of the United States for the said district, and, as such, an officer charged with the execution of the internal-revenue laws of the United
2 States, while attempting to arrest the said Nelson for a violation of the said internal-revenue laws by having in his possession, unlawfully, and by unlawfully selling ardent spirits; that while the petitioner was thus in the performance of his official duty he was assaulted by the said Nelson with a loaded pistol and then and there shot and killed the said Nelson as aforesaid.

The petition prays that the said "cause" may be removed from the jurisdiction of the said justice of the peace and of the county court of the

said county of Smythe to the circuit court of the United States for the western district of Virginia, under section 643 of the Revised Statutes of the United States, as will appear more fully and at large by Exhibit A of the petition filed herein by the Commonwealth of Virginia (pp. 2 and 3).

This respondent, further answering, saith that in obedience to a writ of habeas corpus issued by him, the said Carrico was brought before him, holding a special term of the said district court in Abingdon, Virginia, on the 23d day of December, 1891, by the said jailer, together with his alleged authority for detaining the body of the said Carrico, namely, the warrant of commitment of the said justice of the peace and an indictment of the grand jurors of the said county of Smythe, attending the county court of the said county, charging the said Carrico with the murder of the said James Nelson (Exhibit A, pp. 6–9); and this respondent saith that, on motion of the attorney for the Commonwealth of Virginia, further proceeding under the said writ of habeas corpus was continued to a special term of the district court to be held at said Abingdon on
3 January 8, 1892; and thereupon, on motion of his counsel, supported by testimony, the prisoner was admitted to bail in the sum of $3,000 for his appearance before the said district court to be held as last aforesaid (Exhibit A, p. 10).

And this respondent, further answering, saith that on January 12, 1892, at a special term of the said district court, continued and held at said Abingdon by this respondent, and after due consideration of the testimony offered by the said prisoner on the one part and the said jailer of the county of Smythe on the other, which appears at large in Exhibit A (pp. 39–94), it was adjudged that the said prisoner was held in custody contrary to law by the said jailer for an act done in pursuance of a law of the United States, and that the said prisoner had a right "to have removed into the circuit court of the United States for the western district of Virginia the prosecution pending against him in the county court of Smythe County, Virginia;" and thereupon the said prisoner was recognized in the sum of one thousand dollars for his appearance before the said circuit court on the first day of the next regular term thereof. (Exhibit A, p. 12.)

And this respondent, further answering, saith that the testimony offered in the habeas corpus and the removal proceedings showed that the said James Nelson and his brother, Reuben Nelson, who was in his company at the time the homicide took place, were actively engaged in the illegal peddling of whiskey, and had been thus engaged a few hours only before the killing occurred, and that when the prisoner met and accosted them on the highway, one of them, Reuben Nelson, was carrying a keg which he said contained "a little whiskey," in answer to the prisoner's
4 inquiry, while the other one, the said James Nelson, drew his pistol, saying that "No damned deputy marshal shall arrest me," whereupon the prisoner shot and killed the said James Nelson.

This respondent, further answering, saith that in his judgment the prisoner had probable cause to believe that the said men were then and there engaged in violating section 3452 of the Revised Statutes of the United States by having in their possession whiskey for the purpose of selling the same in fraud of the internal-revenue laws, or with the design to avoid the payment of the taxes imposed thereon, and that consequently the prisoner was

empowered, as a conservator of the peace, to arrest the said men without a warrant as for a violation of law in his presence.

And this respondent, further answering, saith that it was the duty of the prisoner as a deputy marshal, clothed with the powers and duties of a sheriff of the Commonwealth of Virginia, under section 3988 of the Code of Virginia, which is adopted and made a law of the United States by section 788 of the Revised Statutes of the United States, to give information to the attorney of the United States for the western district of Virginia of all violations of penal laws of the United States coming to his knowledge, and that to enable him to perform this duty in the premises it was the right of the prisoner to stop and question the said men as to the contents of the said keg, in view of his strong and, as the sequel showed, his true supposition that they were the men who had just been described to him as openly engaged in having in their possession and selling whiskey in fraud of the internal-revenue laws of the United States.

5 And this respondent, further answering, saith that, the premises considered, there was more than probable cause for holding that James Nelson was, at the time he was killed, in the act of resisting the prisoner in the performance of his duty as a deputy marshal of the United States charged with the duty of arresting offenders against the said internal-revenue laws; wherefore this respondent saith that he conceived it to be his duty under the law to take jurisdiction of the said case by removal into the circuit court of the United States for the western district of Virginia, and, at the same time, to remove the body of the prisoner by the writ of habeas corpus from the custody of the jailer of Smythe County into that of the marshal of the United States for the said district.

And this respondent, further answering, saith that there has already been a trial of the said case in the said circuit court, resulting in a verdict of guilty; which verdict, however, this respondent, as judge of the said court, has set aside, and the said case is now awaiting a new trial, as more fully appears by Exhibit B of the petition, to which reference is hereby specially made.

And this respondent, further answering, saith that the writ of habeas corpus issued herein was not issued under section 643 of the Revised Statutes of the United States, but under section 753, which authorizes the writ where the petitioner "is in custody for an act done or omitted in pursuance of a law of the United States," and that the said W. D. Wilmore, the jailer of Smythe County, prayed an appeal to this honorable court

6 from respondent's order removing the body of the prisoner from the custody of the said jailer, and an appeal was accordingly allowed by respondent on January 12, 1892, as will more fully appear by reference to Exhibit A of the petition (p. 13), but this respondent is advised that the said appeal has not been prosecuted.

And now this respondent, having made return to and fully answered the said rule to show cause, humbly prays that the same may be discharged, and that the petition of the Commonwealth of Virginia may be dismissed, and that he may have judgment for his costs in this behalf unlawfully sustained.

JOHN PAUL,
Judge of the District Court of the United States
For the Western District of Virginia.

UNITED STATES OF AMERICA,
Western District of Virginia, ss:

Before me, Wm. D. Coleman, a commissioner of the circuit court of the United States in and for the district aforesaid, personally appeared on this day John Paul, whose named is signed to the foregoing answer and return, who, being duly sworn by me, says that the same is true to the best of his knowledge, information, and belief.

Given under my hand and the seal of my office at Danville, Virginia, in the district aforesaid, this 18th day of November, 1892.

[SEAL.]

WM. D. COLEMAN,
U. S. Commissioner as aforesaid.

WM. A. MAURY,
Asst. Atty. Gen'l & Counsel for Respondent.

148 U.S. 107

Office Supreme Court U. S.
FILED.
JAN 10 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

EX PARTE THE COMMONWEALTH OF VIRGINIA.

PETITION FOR WRIT OF MANDAMUS.

No. 7—ORIGINAL.

BRIEF OF R. TAYLOR SCOTT, ATTORNEY-GENERAL OF VIRGINIA, FOR PETITIONER.

Supreme Court of the United States.

EX PARTE THE COMMONWEALTH OF VIRGINIA.

THE PETITION AND ANSWER.

The Commonwealth of Virginia complains of the following acts done by Judge John Paul, *at the time* holding the District court of the United States for the Western District of Virginia, and the Circuit court of the United States *at Abingdon*, Virginia, viz:

[*a*] *Said Judge* removed "the indictment" found by a grand jury of Smythe county against Joseph H. Carrico and pending in the County court of Smythe, a court by the constitution and laws of Virginia holding and exercising jurisdiction over said indictment, to the Circuit court of the United States *at Abingdon*:

[*b*] *Said Judge*, by "writ of *habeas corpus*," took the body of said Carrico from the custody of W. D. Wilmore, jailor of Smythe county and let said Carrico to bail:

[*c*] On the — day of May, 1892, *said Judge* called said case (Commonwealth of Virginia vs. Joseph H. Carrico) for trial, and when called petitioner moved to remand it to the County court of Smythe county, because

First.

The Federal court had not jurisdiction over the indictment nor the crime, nor over the person of the offender.

Second.

Because said removal was contrary to the constitution and laws of the United States. which makes the Cause removed.

Judge Paul, in his answer to the rule awarded by this court, justifies his acts and contends that all and each were legal and proper, gives his view of the evidence and places his construction upon Federal statutes.

He says: "It was the duty of the prisoner (Joseph H. Carrico) as a deputy marshal, clothed with the powers and duties of a sheriff of the

Commonwealth of Virginia under "*section* 3988" of the Code of Virginia, which is adopted and made a law of the United States by "*section* 788" of the Revised Statutes of the United States, to give information to the Attorney of the United States for the Western District of Virginia, of all violations of penal laws of the United States coming to his knowledge, and to enable him to perform this duty in the premises it was the right of the prisoner to stop and question the said men as to the contents of the said keg, in view of his strong, and as the sequel showed, his true supposition that they were the men who had just been described to him as openly engaged in having in their possession and selling whiskey in fraud of the internal revenue laws of the United States." Further, that "there was more than probable cause for holding that *James Nelson* was, at the time he was killed, in the act of resisting the prisoner in the performance of his duty of deputy marshal of the United States, charged with the duty of arresting offenders against the internal revenue laws."

"*Exhibits A and B*" filed with and made part of the petition disclose the following facts:

The Case Stated.

Joseph H. Carrico, a citizen of Virginia and resident of Smythe county, on the — day of December, 1891, as deputy of John G. Watts, United States marshal for the Western District of Virginia, had in charge, George Finlay, and was conveying him from Independance, in Grayson county, to Marion, the county seat of Smythe. He dined at the house of J. D. Phipps about 10 o'clock "A. M." After leaving, Phipps met Mr. J. J. Bennington; what then occurred is stated by this witness on pages 86 and 87 of "*Ex. A*," and human ingenuity cannot construe it to be a report to Carrico that the revenue laws were being violated and the offenders would be met as he journeyed on.

Within half a mile Carrico met two brothers, Reuben and James Nelson, Reuben in front, a sack on his shoulders, James behind.

Carrico halted Reuben, commanded him to tell what he had in his sack, and covered him with a pistol he carried in his hand.

James came forward and asked for Carrico's authority? Without a word Carrico turned the pistol upon James Nelson and fired, James fell, and died in a few minutes.

Carrico did not dismount nor did he stop, but rode on. When the body was found half an hour later stark and cold in death, a

pistol was in its holster and James Nelson lying prostrate upon pistol and holster. [See Wampler's and Bennington's evidence, "*Ex. A*," 84 to 86.]

A warrant was sworn out, Carrico arrested, committed to jail, and indicted for the murder by a grand jury regularly impanneled in the County court of Smythe county.

Carrico applied to Judge Paul for writ of *habeas corpus*, the writ issued, he was taken from the custody of the jailor and the Commonwealth's prosecution removed to the United States Circuit court *at Abingdon*. The case tried, Carrico found guilty of "voluntary manslaughter," the verdict, upon his motion, set aside, and he let to bail upon his own recognizance. Upon *these facts* I base the following propositions:

First. The writ of *habeas corpus* was wrongfully and improvidently awarded.

Second. "Commonwealth *v.* Joseph H. Carrico," was improperly and without sanction of law removed from the County court of Smythe county to the Circuit court of United States at Abingdon, Virginia.

Third. Over Jos. H. Carrico and the prosecution against him for the homicide of James Nelson, the Circuit court of the United States, the United States District court for the Western District of Virginia, and *Judge John Paul had not jurisdiction, therefore*.

Fourth. Writ of *mandamus* should be awarded the petitioner.

Argument.

Murder is a common law offence. *Federal courts* have *not* common law jurisdiction in criminal cases.

To confer jurisdiction upon the *Federal court* it must appear not only that Carrico was *first* apprehended in Judge Paul's district, *but also that the offence was committed out of the jurisdiction of any State*.

In "*United States* v. *Hudson and Goodwin*," *decided February* 13, 1812, Johnson, J., said, "The only question this case presents is whether the Circuit court of the United States can exercise common law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

"Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted, and the general acquiesence of legal

men shows the prevalence of opinion in favor of the negative of the proposition. * * * The legislative authority of the union must first make an act a crime, affix punishment to it and declare the court that shall have jurisdiction of the offence.

"Certain implied powers must necessarily result to our courts of justice from the nature of their institution. *But jurisdiction of crimes against the State is not among those powers.*" [7 Cranch. 32.]

This principle was approved and followed in *United States v. Coolidge and als.*, 1 Wheat 415; *United States v. Reese*, 92 United States, 216; *United States v. Jackalow*, 1 Black, 484.

Chief-Justice Marshall held "the courts of the United States are all of limited jurisdiction. * * * Without looking into the indictment under which the prosecution against the petitioner was conducted, we are *unanimously* of opinion that the judgment of a court of general criminal jurisdiction justifies his imprisonment, and that the writ of *habeas corpus* ought *not* to be awarded." [*Ex parte Tobias Watkins*, 3 Peters, 205.]

Again—

In *United States* v. *McBratney*, this court held that the Circuit court of United States for the District of Colorado had not jurisdiction of an indictment against *a white man* for the murder of *a white man* within the Ute reservation in the State of Colorado. *Mr. J. Gray*, speaking for a unanimous court, said:

"It follows that the Circuit court of the United States for the District of Colorado has no jurisdiction of this indictment, but according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the State of Colorado to be dealt with according to law." [*United States v. McBratney*, 104 United States, 621.]

Virginia ex. Rives, 100 *U. S.*, 313,

is conclusive authority upon this point. *Mr. Justice Field* in his able, full, complete and exhaustive opinion thus disposes of *this controversy*.

"The second objection of the Commonwealth to the legality of removal is equally conclusive. The prosecution is for the crime of murder committed within her limits by persons and at a place subject to her jurisdiction. The offence charged is against her authority and laws and she alone has the right to enquire into its commission and to punish the offender.

Murder is not an offence against the United States except when

committed on an American vessel on the high seas or in some port or haven without the jurisdiction of the State, or in the District of Columbia, or in the territories or other places where the National Government has exclusive jurisdiction. The offence within the limits of a State, except where jurisdiction has been ceded to the United States, is as much beyond the jurisdiction of these courts as tho' it had been committed on another continent.

The prosecution of the offence in such a case does not, therefore, arise under the constitution and laws of the United States: and the act of Congress which attempts to give the Federal courts jurisdiction of it is, to my mind, a clear infraction of the constitution. That instrument defines and limits the judicial power of the United States. It declares among other things that the judicial power shall extend to cases in law and equity arising under the constitution, laws and treaties of the United States, and to various controversies to which a State is a party; but it does not include in its enumeration controversies between a State and its own citizens. There can be no ground, therefore, for the assumption by a Federal court of jurisdiction of offences against the laws of a State. The judicial power granted by the constitution does not cover any such case or controversy. And whilst it is well settled that the exercise of the power granted may be extended to new cases as they arise under the constitution and laws, the power itself can not be enlarged by Congress.

The constitution creating a government of limited powers puts a bound upon those which are judicial as well as those which are legislative which cannot be lawfully passed.

This view would seem to be conclusive against the validity of the attempted removal of the prosecution in this case from the State court. The Federal court could not, in the first instance, have taken jurisdiction of the offence charged and summoned a grand jury to present an indictment against the accused, and if it could not have taken jurisdiction at first, it can not do so upon a removal of the prosecution to it. The jurisdiction exercised upon the removal is original and not appellate, as is sometimes asserted. For, as stated by Chief-Justice Marshall in *Marbury vs. Madison*, already cited, it is of the essence of appellate jurisdiction that it revises and corrects proceedings already had. The removal is only an indirect mode by which the Federal court acquires original jurisdiction. *Railway Co. vs. Whitton*, 13 Wall., 270.

The constitution, it is to be observed, in the distribution of the judicial power, declares that in the cases enumerated in which a State is party, the Supreme court shall have original jurisdiction. Its framers seem to have entertained great respect for the dignity of a State, which was to remain sovereign, at least in its reserved powers, notwithstanding the new government, and therefore, provided that when a State should have occasion to seek the aid of the judicial power of the new government or should be brought under its subjection, that power should be invoked only in its highest tribunal. It is difficult to believe that the wise men who sat in the convention which framed the constitution and advocated its adoption, ever contemplated the possibility of a State being required to assert its authority over offenders against its laws in other tribunals than those of its own creation, and, least of all, in an inferior tribunal of the new government. I do not think I am going too far in asserting that had it been supposed a power so dangerous to the independence of the States and so calculated to humiliate and degrade them lurked in any of the provisions of the constitution, that instrument would never have been adopted. There are many difficulties in maintaining the position of the Circuit court which the counsel of the accused and the Attorney-General have earnestly defended. If a criminal prosecution of an offender against the laws of a State can be transferred to a Federal court what officer is to prosecute the case? Is the attorney of the commonwealth to follow the case from his county or will the United States District Attorney take charge of it? Who is to summon the witnesses and provide for their fees? In whose name is the judgment to be pronounced? If the accused is convicted and ordered to be imprisoned, who is to enforce the sentence? If he is deemed worthy of executive clemency—who is to exercise it—the Governor of the State or the President of the United States? Can the Governor release from the judgment of a Federal court? These and other questions which might be asked, show, as justly observed by the counsel of Virginia, the incongruity and absurdity of the attempted proceeding.

Undoubtedly, if in the progress of a criminal prosecution, as well in the progress of a civil action, a question arise as to any matter under the constitution and laws of the United States upon which the defendant may claim protection or any benefit in the case, the decision thereon may be reviewed by the Federal Judiciary, which can examine the case, so far, and so far only, as to determine the

correctness of the ruling. If the decision be erroneous in that respect, it may be reversed and a new trial had.

Provision for such revision was made in the twenty-fifth section of the Judiciary act of 1789, and is retained in the Revised Statutes. That great act was penned by Oliver Ellsworth, a member of the convention which framed the constitution and one of the early Chief-Justices of this court.

It may be said to reflect the views of the founders of the republic as to the proper relations between the Federal and State courts. It gives to the Federal court the ultimate decision of Federal questions, without infringing upon the dignity and independence of the State courts.

By it harmony between them is secured, the rights of both Federal and State governments maintained, and every privilege and immunity which the accused could assert under either can be enforced. "

United States Revised Statutes, section 643.

Judge Paul decided that this statute has no application to the matter under discussion. On page 22, "*Ex. A*," he says: "The writ of *habeas corpus* was merely ancillary to the petition for removal of the case of the "Commonwealth of Virginia *vs.* Jos. H. Carrico," from the County court of Smythe county, Virginia, to the Circuit court of the United States. It was a distinct and different proceeding held in a different court, and under a different statute. It was not taken under the *provisions of "section* 643," *of the Revised Statutes of the United States as counsel for petitioner claim, in which case the writ would have been issued by the clerk of the Circuit court, as provided in said section.* "

"The writ was allowed by the District Judge *on the* 18*th day of December*, 1891, whereas the petition for removal, as shown by record evidence used in the discussion of this motion, was not filed in the clerk's office of the Circuit court until *the* 19*th day of December*, 1891." It must follow "*State of Tennessee vs. James M. Davis*," 100 U. S., 257, and "*Lemuel J. Davis vs. State of South Carolina*," 107 U. S., 597, are not authority and do not apply to this controversy.

Judge Paul's opinion.

Judge Paul's summary of the evidence, ["Ex. A," pp. 16 to 19,] is based upon and gives full credit to *Carrico's testimony*, evidence in material and salient points contradicted and unsupported. *The*

Nelsons did not interfere with Carrico, nor did they, at any time or in any way, obstruct him in the discharge of his duty as deputy marshal of United States.

The homicide was his personal, not official act, and wholly uncalled for, unprovoked and unnecessary. The Nelsons violated no law and committed no offence in *his presence*. Carrico can not find protection in "*section* 3452" of the United States Revised Statutes, nor "*section* 3988," Code of Virginia, 1887.

The former imposes a penalty for having in possession "goods, wares, merchandise, articles, or objects on which taxes are imposed by law for the purpose of selling the same in fraud of the internal revenue laws." *The latter* requires that information shall be given to the attorney for the Commonwealth of the violations of penal laws, "who (attorney for the Commonwealth,) shall forthwith institute and prosecute all necessary and proper proceedings in such case, * * and may in such case issue or cause to be issued a summons for any witness he may deem material to give evidence before the court or grand jury."

Carrico was not a grand "inquisitor," not even a "detective;" his duties were "ministerial," and not "judicial." He could execute but not issue warrants of arrest, and to make arrest "a warrant" was a necessity, and he must have had the warrant in his possession at the *time* the arrest was made. He could exercise only the power of *a deputy sheriff*, and for such officer to make arrest "*not only must there be a warrant, * * * but to justify the arrest the officer must have the warrant with him.*" Lewis, P., *Muscoe's case*, 86 *Va.*, 478.

Federal Question.

Carrico pleaded in bar of the indictment, found no privilege or right conferred by the constitution and laws of the United States. There is no *Federal* question in this contention, and however viewed, it is manifest and clear that the Federal court had not jurisdiction, and its every act and order was and is *null and void*. *Wood* v. *Brush*, 140 U. S., 278–371; *McElraine* v. *Brust*, 142 U. S., 155–160.

Virginia, the petitioner, has established her right to the writ she asks at the bar of this, the highest tribunal in the land, its peculiar and most common use to restrain inferior courts and keep them within their lawful bounds.

R. TAYLOR SCOTT,
Attorney-General of Virginia, for petitioner.

RICHMOND, VA., *January* 9, 1893.

145 U.S. 107

IN THE

Supreme Court of the United States.

No. .....

EX PARTE: In the matter of COMMONWEALTH OF VA., Petitioner.

"EXHIBIT A," with Petition.

C. L. HILL PRINTING COMPANY, RICHMOND, VA.

IN THE

Supreme Court of the United States.

JOSEPH H. CARRICO, PETITIONER,

vs.

W. D. WILMORE, JAILER OF SMYTH CO., VA., RESPONDENT.

WRIT OF HABEAS CORPUS.

The United States of America, Western District of Virginia, to-wit:

At a District Court of the United States for the Western District of Virginia, begun and held at the court-house in the city of Abingdon, on the twelfth day of January, in the year of our Lord eighteen hundred and ninety-two.

Present, Hon. John Paul, Judge of the Western District of Virginia.

Among others were the following proceedings, to-wit:

Joseph H. Carrico, petitioner, vs. W. D. Wilmore, jailer of Smyth county, Virginia, respond't. } Writ of habeas corpus.

In the District Court of the United States for the Western District of Virginia.—In vacation:

Be it remembered, that heretofore the said Joseph H. Car-

rico presented a petition for removal of the case pending in the county court of the county of Smyth, Virginia, charging him with the killing of James Nelson, and for a writ of *habeas corpus*, which, with the endorsements thereon, is in the words and figures following, to-wit:

PETITION FOR WRIT OF HABEAS CORPUS.

To the Hon. John Paul, Judge of the United States Circuit Court:

Your petitioner, Joseph H. Carrico, would most respectfully show to the Court, that on the 12th day of December, 1891, one Kirk, a justice of the peace of Smyth county, Virginia, issued his warrant in the name of the Commonwealth of Virginia, addressed to Constable Scott, of the said county, commanding him to arrest your petitioner, and bring his body before said justice for willfully, premeditatedly, and of his malice aforethought, killing and murdering one James Nelson, in the said county of Smyth, on the 11th day of December, 1891, and upon said warrant the said Constable Scott did arrest your petitioner, late on Saturday evening, December 12th, 1891, and delivered him to W. D. Wilmore, the jailer of Smyth county, Virginia; and your petitioner is now confined in the jail of Smyth county, at Marion, awaiting a trial before said justice, upon the said charge of murder.

Your petitioner further shows that no murder was committed, but, on the contrary, the killing was committed in his own necessary self-defense, to save his own life; that at the time the alleged act, for which he was arrested and confined to said jail, was committed, he was and still is an officer of the United States, to-wit: a deputy-marshal under John G. Watts, United States Marshal of the Western District of Virginia, and is an officer of internal revenue, and the act for which he was arrested, and for which he is now incarcerated, was performed in his own necessary self-defense while engaged in the discharge of the duties of his office as deputy-marshal, in arresting a violator of internal revenue, the said James Nelson, deceased, who had in his possession at the time and was sell-

ing illicit ardent spirits in violation of the internal revenue laws of the United States; and petitioner was acting by and under the authority of the internal revenue laws of the United States, and what he did was done under and by right of his office, to-wit: as deputy-marshal in enforcing the internal revenue laws of the United States.

It is the petitioner's duty to arrest all violators of the said internal revenue laws, and to seize all illicit packages and kegs of illicit spirits, and while so attempting to enforce the revenue laws of the United States, as deputy-marshal aforesaid, petitioner was assaulted with a loaded pistol by the said James Nelson, deceased, who was in company with his brother, another "blockader" and violator of said laws, and in defense of petitioner's life he fired upon the said James Nelson with a loaded pistol, which as said officer he carried, and in this way only did he kill the said James Nelson.

In view of these facts, under section 643 of the Revised Statutes of the United States, your petitioner prays that said cause may be removed from the jurisdiction of the said Kirk, justice of the peace of said county of Smyth, and from the county court of said county, to the Circuit Court of the United States for the Western District of Virginia for trial; and as your petitioner, by said warrant, has been personally arrested and is now confined in the jail of Smyth county at Marion, your petitioner further prays that a writ of *habeas corpus cum causa* be awarded by your Honor, a duplicate of which shall be delivered to W. C. Sexton, clerk of the county court of Smyth, and that the marshal of said district, or one of his deputies, by virtue of the said writ of *habeas corpus cum causa*, do take the body of your petitioner into his custody, to be dealt with in the cause according to law, and according to the order of your Honor's court, in vacation; and upon the removal of said prosecution, that a copy of the record and proceedings before said justice and by said constable be brought into your Honor's circuit court; and as in duty bound he will ever pray.

F. S. & J. C. BLAIR,
Attorneys for Petitioner.

State of Virginia—County of Smyth, to-wit:

I, Joseph H. Carrico, being duly sworn, do hereby depose and say, that I am the petitioner named in the foregoing petition; that I have heard the same read, and that the matters and things contained therein are true of my own knowledge.

(Signed), J. H. CARRICO, Petitioner.

Subscribed and sworn to before me, W. E. Williams, a United States commissioner for Smyth county, on this twelfth day of December, 1891.

W. E. WILLIAMS,
U. S. Com'r for West'n Dist. of Virginia.

I, F. S. Blair, being an attorney at law of the United States Circuit Court for the Western District of Virginia, the same being a court of record, do hereby certify that, as one of the counsel for the petitioner, I have examined the proceedings against him and carefully inquired into all the matters set forth in the foregoing petition, and that I believe them to be true.

F. S. BLAIR, Attorney for Petitioner.

December 12, 1891.

Endorsed:

In re
vs.
Joseph H. Carrico. } Petition for removal.

Filed December 19, 1891. I. C. FOWLER,
U. S. Dist. Court, Abingdon, Va.

ORDER FOR THE WRIT OF HABEAS CORPUS, &c.

In the District Court of the United States for the Western District of Virginia—In vacation:

Upon the petition of Joseph H. Carrico, stating that he is illegally detained in custody by W. D. Wilmore, the jailer of Smyth county, Virginia, a writ of *habeas corpus* is granted him, directed to the said W. D. Wilmore, jailer of Smyth

county, Virginia, commanding him to have the body of the said petitioner, Joseph H. Carrico, before the judge of this court on Wednesday, the 23d day of December, 1891, at 10 o'clock A. M., at Abingdon, Virginia, together with the day and cause of his caption and detention.

(Signed.) JOHN PAUL,
U. S. Dist. Judge for the West. Dist. of Va.

December 18, 1891.

Recorded December 19, 1891.

I. C. FOWLER, Clerk.

WRIT OF HABEAS CORPUS.

United States of America, Western District of Virginia:

To W. D. Wilmore, Jailer of Smyth County, Virginia, Greeting:

We command you that the body of Joseph H. Carrico, in your custody as is said is detained, you have before the judge of our District Court for the Western District of Virginia on Wednesday, the 23d day of December, 1891, at 10 o'clock A. M., at Abingdon, Virginia, together with the day and cause of his caption and detention.

Witness, the Hon. John Paul, judge of the District Court of the United States for the Western District of Virginia, and the seal thereof, at Abingdon, in said district, the 19th day of December, A. D. 1891, and of our independence the 116th year.

I. C. FOWLER, Clerk. [L. S.]

Endorsed: *In Re.* J. H. Carrico. *Habeas corpus.* Filed Dec. 22, 1891.

I. C. FOWLER,
U. S. District Clerk, Abingdon, Va.

RETURN OF UNITED STATES MARSHAL.

Executed December 22d, 1891, by delivering a certified copy of the within to W. D. Wilmore, jailer of Smyth county, in

Marion, Va., and a like copy to John R. Sexton, deputy for W. C. Sexton, clerk of Smyth County and Circuit courts, at his office in Marion.

JOHN G. WATTS, U. S. Marshal,
Per Thos. Dunn, D. M.

RETURN MADE BY W. D. WILMORE, JAILER, &C.

To the Hon. Judge Paul, Judge of the District Court of the United States for the Western District of Virginia:

W. D. Wilmore, keeper of the jail of Smyth county, to whom the within writ is directed, has now here before the court the body of Joseph H. Carrico, therein named, as thereby commanded, and I certify that the causes of the detention of the said Joseph H. Carrico is a warrant of commitment directed to me, a copy of which is hereby annexed, marked Exhibit "A," and made a part hereof, and the proceedings of the County Court of Smyth and the Commonwealth of Virginia, marked Exhibit "B," and made part and parcel of this return.

Dated this 23d day of December, 1891.

W. D. WILMORE,
Jailer of Smyth County, Va.

EXHIBIT "A."

Virginia—Smith county, to-wit:

To William Scott, Constable of said County, and to the Keeper of the Jail of said County:

These are to command you, the said constable, in the name of the Commonwealth of Virginia, forthwith to convey and deliver into the custody of the keeper of said jail, together with the warrant, the body of Joseph H. Carrico, charged before me, John J. Kirk, a justice of the said county, on the oath

of R. W. Nelson, with a felony by him committed—in this, that the said Joseph H. Carrico, on the 11th day of December, 1891, in the said county, feloniously and of his malice did kill and murder one James M. Nelson; and you, the said keeper of the said jail, are hereby required to receive the said Joseph H. Carrico into your jail and custody, that he may be examined for the said offense by the County Court of the said county, and him there safely keep until he shall be discharged by due course of law.

Given under my hand and seal this, the 14th day of December, 1891.

JOHN J. KIRK, J. P.

Endorsed: Filed December 22, 1891.

I. C. FOWLER,
United States District Clerk,
Abingdon, Va.

EXHIBIT "B."

Virginia: At a court held for Smyth county, at the court-house thereof, on Monday the twenty-first day of December, 1891:

The Commonwealth of Virginia, Plaintiff,
vs.
Joseph H. Carrico, Defendant,
} Indictment for felony.

Be it remembered, that at the same term, to-wit: on the same day and year first herein mentioned, A. J. Harris, foreman; John T. Johnston, Jr., William Edmonds, S. P. Pruner, Henry Kigley, L. N. Copenhaver, H. C. Dutton, and Lindsey Bowlen, were empanelled and sworn a special grand jury of inquest in and for the body of Smyth county, and, having received their charge, were sent to their room to consider of their presentments, and after some time returned into court and presented

"An indictment against Joseph H. Carrico for a felony—a true bill"; which indictment is in the words and figures following, to-wit:

Virginia—County of Smyth, to-wit:

In the county court of said county: The jurors of the Commonwealth of Virginia in and for the body of the county of Smyth, and now attending the said court, upon their oath present that Joseph H. Carrico, on the —— day of December, 1891, with force and arms, and in said county, in and upon one James M. Nelson, in the peace of said Commonwealth then and there being, feloniously, willfully, and of his malice aforethought did make an assault; and that the said Joseph H. Carrico a certain pistol of the value of four dollars, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said Joseph H. Carrico, in his right hand then and there had and held, then and there feloniously, willfully, and of his malice aforethought did discharge and shoot off, to, against, and upon the said James M. Nelson; and that the said Joseph H. Carrico, with the leaden bullet aforesaid, out of the pistol by the said Joseph H. Carrico discharged and shot off as aforesaid, then and there feloniously, willfully, and of his malice aforethought did strike, penetrate, and wound the said James M. Nelson in and upon the left breast of him the said James M. Nelson, giving to him, the said James M. Nelson, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Joseph H. Carrico, in and upon the left breast of him, the said James M. Nelson, one mortal wound, of which said mortal wound he the said James M. Nelson then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Joseph H. Carrico him the said James M. Nelson, in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the Commonwealth of Virginia, upon the evidence of Rube Nelson, W. M. Haywood, A. Bennington, William Parke, Creek Hank, M. B.

Wampler, L. C. Parke, witnesses sworn in open court, and sent to the grand jury to give evidence.

And now at this day, to-wit:

At the court-house aforesaid, on the same day and year first herein mentioned, Joseph H. Carrico, who is charged with a felony, having been removed from the jail of this court to the jail of Washington county for safe-keeping, and the said Joseph H. Carrico having been indicted by a grand jury in this court for said felony, it is ordered that the sheriff of this county do convey the body of the said Joseph H. Carrico from the said jail of Washington county to the jail of this county, that he may be tried on said indictment in this court on to-morrow, the second day of this term.

Virginia—Smyth county, to-wit:

I, Jno. R. Sexton, deputy for N. C. Sexton, clerk of Smyth County Court, do hereby certify that the foregoing is a true transcript of the record of said court in said case.

In testimony whereof I have hereunto set my hand and annexed the seal of the said court this seventh day of January, 1892.

JOHN R. SEXTON,
Deputy for W. C. Sexton, clerk Symth County Court.

Endorsed: Commonwealth of Virginia vs. Joseph H. Carrico. Copy indictment, &c. Exhibit "B" filed May 17, 1892.

I. C. FOWLER,
U. S. District Clerk, Abingdon, Va.

And on another day, to-wit:

At a special term of the District Court of the United States, begun and held for the Western District of Virginia, at Abingdon, on Wednesday, the 23d day of December, 1891:

Present: Hon. John Paul, judge, presiding.

Joseph H. Carrico, plaintiff,
vs.
The Commonwealth of Virginia, defendant.
} On writ of habeas corpus.

This day came the parties by their attorney, and the writ of *habeas corpus* heretofore awarded and issued upon the petition of the said Joseph H. Carrico having been returned executed, and the jailer of Smyth county, Virginia, W. D. Wilmore, having, in obedience to said writ, delivered into the custody of the court the body of the said Joseph H. Carrico, and also filed his return showing by what authority he had detained the said Joseph H. Carrico:

On motion of A. M. Dickinson, attorney for the Commonwealth of Virginia, for Smyth county aforesaid, it is ordered that this case be continued to a special term of this court to be held at Abingdon, Virginia, on Friday the 8th day of January, 1892.

On motion of the petitioner, J. H. Carrico, by his attorney, it is ordered that the said Joseph H. Carrico be admitted to bail for his appearance before this court at the special term aforesaid. And the court having heard testimony, it is ordered that he be admitted to bail, as aforesaid, in the sum of $3,000.

It is likewise ordered that the witnesses present for the petitioner be recognized for their appearance at the said special term, which was accordingly done.

Thereupon the said Joseph H. Carrico, with A. J. Finley, J. A. Harris, Clay Wolfe, and W. E. Williams, as his sureties, entered into a bond in the sum of three thousand dollars, conditioned according to law, for his appearance before this court at the special term aforesaid, on Friday the 8th day of January, 1892.

Order continuance one day: January 8, 1892.

And at another term, to-wit:

At a special term of the District Court of the United States,

begun and held for the Western district of Virginia, at Abingdon, on Friday the 8th day of January, 1892.

Present: Hon. John Paul, judge, presiding.

Joseph H. Carrico, plaintiff,
vs.
The Commonwealth of Virginia, defendant.
} On writ of habeas corpus.

This day came the parties by their attorneys, and, on motion of defendant, by its attorney, it is ordered that the case be continued until ten o'clock to-morrow morning.

ORDER AMENDING JAILER'S RETURN.

And on another day, to-wit:

At a special term of the District Court of the United States, continued and held for the Western District of Virginia at Abingdon, on Saturday the 9th day of January, 1892:

Present: Hon. John Paul, judge, presiding.

J. H. Carrico, plaintiff,
vs.
Commonwealth of Virginia, defendant.
} On habeas corpus.

This day came the parties by their attorneys, and defendant, by its attorney, R. Taylor Scott, moved the court for permission to amend the return of the jailer of Smyth county to the writ of *habeas corpus* by adding thereto Exhibit B., the transcript of the proceedings of Smyth County Court against the plaintiff in this case, J. H. Carrico, which permission was granted by the court, and the return of the marshal of Smyth county was accordingly so amended. * * *

ORDER REMOVAL, &c.

And, on another day, to-wit:

At a special term of the District Court of the United States,

continued and held for the Western District of Virginia, at Abingdon, on Tuesday the 12th day of January, 1892:

Present: Hon. John Paul, judge, presiding.

Joseph H. Carrico, plaintiff,
vs.
Commonwealth of Virginia, defendant.
} On habeas corpus.

In this cause, the court having heard the testimony introduced on behalf of the petitioner, as well as that introduced on behalf of the respondent, W. D. Wilmore, sheriff of Smyth county, Virginia, and the arguments of counsel for the petitioner and respondent, and it appearing to the court that the petitioner is in custody from an act done in pursuance of a law of the United States, and is held in custody contrary to law by the jailer of Smyth county, Virginia, and that he has a right to have removed into the Circuit Court of the United States for the Western District of Virginia the prosecution pending against him in the County Court of Smyth county, Virginia:

It is therefore ordered that the petitioner be recognized in the sum of one thousand dollars for his appearance before the Circuit Court for this district on the first day of the next regular term thereof, to answer the indictment found against him by a grand jury of the County Court of Smyth county, Virginia. And thereupon came the said Joseph H. Carrico, who entered into a bond in the sum of one thousand dollars, with security conditioned according to law, for his appearance before the Circuit Court at its next regular term as aforesaid.

ORDER NUNC PRO TUNC, MAY 14, 1892.

And at another term, to-wit:

At a regular term of the District Court of the United States for the Western District of Virginia, continued and held at Abingdon, Va., on Saturday the 14th day of May, A. D 1892:

Present: Hon. John Paul, District Judge.

Joseph H. Carrico, Petitioner,
vs.
W. D. Wilmore, Jailer of Smith County, Va., Respondent.
} Writ of habeas corpus.

This day came the parties by their attorneys, and the respondent moved the court to so amend the order made in this case on the 12th day of January, 1892, at a special term of this court, as to allow him an appeal to the Supreme Court of the United States, and to certify that the question of the jurisdiction of this court to hear and determine the writ of *habeas corpus* in the manner it did is alone involved, and to be reviewed; which motion was objected to by petitioner. Argument of counsel being heard, the court is of opinion, for reasons stated in writing and filed with the papers in this case, that said motion should be granted and said appeal allowed. It is therefore ordered that the order entered in this case on the 12th day of January, 1892, be and the same is hereby amended, granting an appeal now, as for then, to the respondent, from the decision of this court, made by its order of the 12th of January, 1892, at a special term of the court, the question to be certified being *the jurisdiction of this court to hear and determine the matters involved in the trial of the writ of habeas corpus* sued out by the petitioner against the respondent. It is further ordered that the record in this case be so amended that the docket style of this case be—

Joseph H. Carrico, Petitioner,
vs.
W. D. Wilmore, Jailer of Smyth County, Virginia, Respondent.

Joseph H. Carrico, petitioner,
vs.
W. D. Wilmore, jailer of Smyth county, Va., respondent,
} Upon a writ of habeas corpus.

Section 643 of the Revised Statutes of the United States provides as follows:

Sec. 643. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, * * * the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counsellor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the circuit court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court. * * * When the suit is commenced in the State court by * * * *capias*, or by any other similar form of proceedings by which a personal arrest is ordered, he (the clerk of the circuit court) shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office by the marshal of the district, or his deputy, or some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the

State court shall be void. And if the defendant in the suit or prosecution be in actual custody on *mesne* process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to the law and the order of circuit court, or, in vacation, of any judge thereof. * * *

On the 18th day of December, 1891, in the vacation of this court, Joseph H. Carrico, the petitioner, presented his petition to the district judge, reciting that he had been arrested upon the warrant of a justice of the peace of the State of Virginia, charging him with murder, and was in the custody of the jailer of Smyth county, Virginia, on said charge; and avering that there was no murder, but that the killing was committed in his own necessary self-defense while engaged in the discharge of the duties of his office as deputy-marshal in arresting a violator of the internal revenue laws of the United States, and praying that a writ of *habeas corpus cum causa* issue, directed to W. D. Wilmore, the jailer of Smyth county, Virginia. Upon said petition a writ of *habeas corpus* was granted as therein prayed, and served upon said W. D. Wilmore, jailer of Smyth county, Virginia, upon which the following return was made:

"*To the Hon. Judge Paul, Judge of the Circuit Court of the United States for the Western District of Virginia:*

"W. D. Wilmore, keeper of the jail at Smyth county, Virginia, to whom the within writ is directed, has now here before the court the body of Joseph H. Carrico, therein named, as thereby commanded; and I certify that the cause of the detention of the said Joseph H. Carrico is a warrant of commitment directed to me, a copy of which is hereto annexed, marked "Exhibit A," and the proceeding of the county court of Smyth and the Commonwealth of Virginia, marked "Exhibit B," and made part and parcel of this return.

Dated this 23d day of December, 1891.

"W. D. WILMORE,
"Jailer of Smyth County, Virginia."

The hearing of the case was continued to the 8th day of January, 1892, when, on the hearing, the following facts were shown:

That the petitioner was a deputy-marshal; that on the 11th day of December, 1891, he was on his way from Independence, Grayson county, Virginia, with a United States prisoner in his custody, taking said prisoner to the jail of Smyth county, Virginia; that on his way he learned that some men were selling liquor unlawfully in the neighborhood, and he was told that he would probably meet said men on the road; that from what he learned he supposed these men to be the two Nelsons; that after receiving this information he had not gone more than a mile when he met two men on the highway, who proved to be the two Nelsons; that one of them was carrying a keg, and that he said to them: "It is reported to me that you are selling liquor, and I want to see what you have got there in that keg, and who are you?" That the man with the keg answered: "A little whiskey." That the deceased said to petitioner: "Who the hell are you?" and that petitioner replied: "I am a deputy-marshal"; that the deceased then said: "No damned deputy-marshal shall arrest me," and drew his pistol; that at this point the petitioner, having his pistol in his hand, fired and killed the deceased.

Upon this showing of the facts, counsel for the respondent contended that the State court alone had jurisdiction of the case, and insisted that petitioner should remain in the custody of the jailer of Smyth county for trial in the State court; whereupon the court delivered the following opinion:

"Officers, who by virtue of their offices are conservators of the peace, have, at common law, the right to arrest without warrant all persons who are guilty of a breach of the peace or other violation of criminal law in their presence." (1 American and English Ency. of Law. 734.)

The Revised Statutes of the United States provides as follows:

"Section 3452. Every person who shall have in his custody

or possession any goods, wares, merchandise, articles, or objects, on which taxes are imposed by law, for the purpose of selling the same in fraud of the internal revenue laws, or with design to avoid the payment of the taxes imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of taxes fraudulently attempted to be evaded." A violation of this statute would be a misdemeanor. (Code of Virginia, section 3879.) If committed in the presence of a sheriff, the offender could be arrested without a warrant (*Musdoe* vs. *Commonwealth*, 86 Virginia Reports, 443; and Davis's Criminal Law, 402.)

It is clearly proved that James Nelson, the deceased, and his brother, Reuben Nelson, who was with him at the time he was killed, had been engaged only a few hours before in selling liquor unlawfully; that Reuben Nelson, when asked by the petitioner what he had in the keg which he was carrying, replied that he had "a little whiskey." These men having been engaged in selling whiskey during the day ten or fifteen miles from their home, and acknowledging that they had whiskey in a keg at the time they were accosted by the deputy marshal, the fair presumption is that they had said whiskey "for the purpose of selling the same in fraud of the revenue laws," thus bringing their offense within the provisions of section 3452 of the Revised Statutes of the United States.

It is further shown by the evidence that the petitioner had been informed, but a few minutes before he met the deceased and his brother, that unlawful sales of liquor had been made that day at a corn-shucking in that immediate neighborhood and on the road which the petitioner was travelling with his prisoner, and that he would probably meet the men who were selling the liquor; that when he met the two Nelsons he supposed (the evidence shows that he was correct) that they were the persons who had been selling the liquor unlawfully. So, seeing the keg which one of them carried, and being informed that it contained whiskey, the petitioner was authorized to arrest these persons without warrant for a violation of the

provisions of section 3452 of the Revised Statutes of the United States.

The court is of the opinion that the offense described in that statute was being committed in the presence of the petitioner, and if he had arrested the men who were doing it he would have been performing his duty and acting in the line of his authority, for section 788 of the Revised Statutes of the United States provides that "the marshals and their deputies shall have in each State the same powers in executing the laws of the United States as the sheriffs and their deputies in such State may have by law in executing the laws thereof." This statute invests the marshal and his deputies in this district with all the powers, common law and statutory, which a sheriff and his deputies have in the State of Virginia; and, as we have already seen, a sheriff or his deputy in Virginia has power to arrest without warrant for an offense committed in his presence.

In addition to the common law powers of a sheriff in the State of Virginia, the Code of Virginia, section 3988, makes it the duty of the sheriff to give information of the violation of any penal laws to the attorney for the Commonwealth, whose duty it is to institute a prosecution in such case. This duty imposed upon the sheriff necessarily carries with it the implied power to investigate, inquire into, and ascertain if an offense has been or is being committed, in order that he may report the same to the proper prosecuting officer. The petitioner testifies that it was his purpose, in stopping the Nelsons and inquiring their names, and what they had in the keg, to ascertain if they were violators of the law, and that if they were that he might take the proper steps to have them prosecuted. In view of the duty imposed upon a sheriff by the Code of Virginia, and the necessary and incidental power conferred by the imposition of that duty, and the marshal, by section 788 of Revised Statutes of the United States, having the same power, the petitioner had a right, when he suspected the Nelsons of violating the revenue laws of the United States, to make of them, or other persons, all proper inquiries as to such violations of law; and being a conservator of the peace, like a sheriff, it

was his duty to do so, and in doing so he was acting in the line of his duty. So the Court is of the opinion that under the facts presented in this case, whether it was the purpose of the petitioner to arrest the deceased and his brother, or to make inquiries of them with a view of ascertaining whether they were or had been engaged in violating the internal revenue laws, he was acting within the scope of his authority, and that the Circuit Court of the United States has jurisdiction of the prosecution instituted against him in the State court, and that the petitioner has a right to have the same removed into the circuit court for trial.

Counsel for the petitioner claims that, under the evidence, he is entitled to an absolute discharge. The Court does not care at this time to enter into a discussion of the facts as shown by the evidence on which this demand is based. For the present it contents itself with saying that it deems it its duty not to discharge the petitioner. He will be allowed bail in the sum of one thousand dollars to appear before the United States Circuit Court at its next regular term at Abingdon.

JOHN PAUL,
District Judge.

January 12, 1892.

Joseph H. Carrico, petitioner,
vs.
W. D. Wilmore, jailer of Smyth county, Virginia, respond't.

Petition for a writ of habeas corpus.

On the 18th day of December, 1891, petitioner presented his petition to the judge of the District Court, in vacation of the court, alleging that he was unlawfully detained in custody by the respondent on an alleged charge of murder in killing one James Nelson, and alleging that the killing of said Nelson was no murder, but was done in petitioner's own necessary self-defense while in the discharge of his duties as deputy marshal in enforcing the internal revenue laws of the United States, and praying for a writ of *habeas corpus cum causa*, and also

alleging that he had a right to be tried in the Circuit Court of the United States for said alleged offense. Upon this petition the judge of the District court made the following order:

In the District Court of the United States for the Western District of Virginia—In vacation:

Upon the petition of Joseph H. Carrico, stating that he is illegally detained in custody by W. D. Wilmore, the jailer of Smyth county, Virginia, a writ of *habeas corpus* is granted him, directed to the said W. D. Wilmore, jailer of Smyth county, Virginia, commanding him to have the body of the said petitioner, Joseph H. Carrico, before the judge of this court on Wednesday the 23d day of December, 1891, at 10 o'clock A. M., at Abingdon, Virginia, together with the day and cause of his caption and detention.

JOHN PAUL,
U. S. Dist. Judge for the Western District of Virginia.
December 18th, 1891.

On this order a writ of *habeas corpus* was issued, returnable to the 23d day of December, 1891. On that day respondent filed his return to said writ, as follows:

To the Hon. Judge Paul, Judge of the District Court of the United States for the Western District of Virginia:

W. D. Wilmore, keeper of the jail of Smyth county, to whom the within writ is directed, has now here before court the body of Joseph H. Carrico, therein named, as thereby commanded, and I certify that the cause of the detention of said Joseph H. Carrico is a warrant of commitment directed to me, a copy of which is hereto annexed, marked Exhibit "A," and the proceedings of the County Court of Smyth county and the Commonwealth of Virginia, marked Exhibit "B," and made part and parcel of this return.

Dated this 23d day of December, 1891.

W. D. WILMORE,
Jailer of Smyth County, Va.

Upon this return petitioner was admitted to bail, and the further hearing of the case continued to the 8th day of January, 1891; and at a special term of the District Court, begun on the last-named day at Abingdon, Virginia, the court heard the evidence in the case, and on the 12th day of January, 1892, entered the following order:

It appearing to the court that petitioner is in custody for an act done in pursuance of a law of the United States, and is held in custody contrary to law by the jailer of Smyth county, Virginia, and that he has a right to have removed into the Circuit Court of the United States for the Western District of Virginia the prosecution pending against him in the County Court of Smyth county, Virginia, it is therefore ordered that the petitioner be recognized in the sum of one thousand dollars for his appearance before the Circuit Court for this district, on the first day of the next regular term thereof, to answer the indictment found against him by a grand jury of the County Court of Smyth county, Virginia.

No appeal having been taken to this order by respondent at the time it was entered, he now asks leave, at this, the first term of the District Court since the special term at which said order was entered, to amend the same and grant him an appeal to the Supreme Court of the United States.

Petitioner objects to said order being amended as prayed for, on the ground that an appeal lies only from a final decision, and that the order of January 12th, 1892, taking petitioner from the custody of respondent and holding him to answer the indictment to the United States Circuit Court, is not such a final order as would give respondent the right to appeal, and on the further ground that respondent has no right of appeal even if the said order be regarded as final.

The court does not concur in these objections. It thinks the order releasing petitioner from the custody of the respondent and placing him in the custody of the marshal, and holding him to answer in the Circuit Court of the United States the

indictment found against him in the county court of Smyth, is as final, as far as the respondent is concerned, as if the order had been for the absolute discharge of the petitioner from the custody of respondent. In the argument, counsel for the petitioner claimed that no case can be found in the reported decisions of the United States Court where such an appeal has been allowed to respondent. This position is incorrect. Such an appeal was allowed to the sheriff of San Joaquin county, California, in the case known as the Neagle Case, 135 U. S. Reports, p. 1. Such an appeal was also allowed in the case of Brinmer vs. Rebman, 138 U. S. Reports, p. 78; and no doubt other decisions might be found to the same effect.

Nor is the position taken by counsel for the petitioner correct, that the writ of *habeas corpus* was merely ancillary to the petition for the removal of the case of the Commonwealth of Virginia vs. Joseph H. Carrico from the county court of Smyth county, Virginia, to the Circuit Court of the United States. It was a distinct and different proceeding, held in a different court, and under a different statute. It was not taken under the provisions of section 643 of the Revised Statutes of the United States, as counsel for petitioner claim, in which case the writ would have been issued by the clerk of the circuit court, as provided in said section. The writ was allowed by the district judge on the eighteenth day of December, 1891, whereas the petition for removal, as shown by record evidence used in the discussion of this motion, was not filed in the clerk's office of the circuit court until the nineteenth day of December, 1891.

The court is of opinion that the respondent in this case has the right to appeal to the Supreme Court of the United States, and the order will be amended accordingly.

JOHN PAUL, Dist. Judge.

May 14, 1892.

And, therefore, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the

said United States Supreme Court: and the same is transmitted accordingly.

Teste: I. C. FOWLER, Clerk,
Per STUART F. LINDSEY, Deputy Clerk.

The Commonwealth of Virginia,
vs.
J. H. Carrico.

In the Circuit Court of the United States for the Western District of Virginia, at Abingdon. Paul, J.:

Counsel for defendant stated that the purpose of the proceeding was to remove the above-styled case from the State court to the United States court—the offense with which the prisoner is charged having been committed while in the discharge of his official duties as deputy marshal of the United States.

The attorney for the Commonwealth then stated that on account of the absence of witnesses he was not prepared to proceed with the motion. Whereupon the court stated that in view of the importance of the case it would be adjourned until the 8th day of January, 1892, in order to give ample time to give the matter thorough investigation.

The prisoner then, by his counsel, moved the court to allow him bail, and, in support of said motion, introduced the following testimony:

J. H. Carrico, the prisoner, was sworn, and testified as follows:

Question by Mr. Blair: Mr. Carrico, are you a deputy marshal for the United States for Smyth county?

A. Yes, sir.

Q: Now, just tell his Honor up there what occurred at the time it came necessary for you to shoot this man Nelson—tell all that occurred from beginning to end.

A. Well, sir, I had Mr. Finlay here under two warrants

from our county, and I had two mittimuses. One had been issued before the last term of this court, and the other had been issued at the last term sentencing him to the Grayson jail, and I had made a mistake, and I made a mistake and took him to Grayson jail on the other one. I wrote to Mr. Fowler about it and didn't get a satisfactory answer, and then I wrote to ——, and he told me his time would be out on the 11th, and then to bring him to Smyth. And I went over and got my prisoner and started back, and got across the Iron mountain coming back—

Q. Just tell what occurred when it became necessary to shoot this man Nelson.

A. I had a pistol with me, and I put Mr. Finlay on my horse and walked with my pistol deter him; he was said to be a pretty bad man himself; and we saw a crowd of men standing in the lane, and the prisoner remarked to me that them men were drinking and quarreling, and I remarked that I didn't think they were; and we come on, and when we got up to them I said, "How do you do, gentlemen," and as soon as we passed, a gentleman by the name of Bumgardner hollowed and said something, and the prisoner said, "That fellow is hollowing at you." Bumgardner appeared to be drinking, and I told him the prisoner I had and where I had been, and he said, "If you don't mind some of those blockaders will get you," and I said, "I reckon not." And this prisoner says to him, "Haven't you got any whiskey, or can't you tell us where we can get some whiskey," and he says, "No, I hain't got any; but I was over at —— a corn-shucking, and they told me some fellows were out there with some, and they were not more than fifteen minutes ahead of us and you will meet them in the road," and I said, "Let's hurry on," and we went on and met them just before we got to the top of the hill, and I was explaining to him the process of making lime (?), and he looked up and said, "There comes them men." When we met them I said, "How are you, gentlemen. It is reported to me that you are selling liquor, and I want to see what you have got, and who are you?" and the man with the keg on his back said he had whiskey,

and that is all he said, I think; and the other man he just stormed out at me, "Who in the hell are you?" And I said, "I am a deputy marshal," and he said, "No damned marshal shall arrest me," and he went back for his pistol, and I throwed my pistol on him and fired, not thinking what the effects would be, only to save myself. My heart rose up in my head. I didn't know what would be done, only I was trying to save myself.

Q. You wouldn't have shot him for that?

A. I would not have shot him for the world if I had not thought my life was in danger.

Q. You had the prisoners?

A. Yes, I had the prisoner.

Q. Who else was there?

A. There was nobody else there. When the pistol fired the man appeared to be stunned, and then the horse started with the prisoner and run up the hill, I reckon, fifty yards before we got him stopped; and when the prisoner and me got the horse stopped I reckon we had went fifty yards, and then the prisoner looked back and said: "That man is killed"; and I said, "I believe he is." He fell back with his pistol in his hand.

Q. Did you know these people?

A. I supposed they were Nelsons, for I had been told the Nelsons were carrying liquor in the valley.

Q. You had been warned that they were dangerous men, had you or not?

A. Yes, sir; everybody had told me that.

Q. State whether or not there was a warrant out for the Nelson that is alive?

A. I don't know that to be a fact; I understand there was.

By the Court:

Q. Was it issued from this court or from a commissioner?

A. I don't know about that.

Mr. Blair:

Q. Do you know who issued the warrant?

A. If there was a warrant, I suppose it was issued by Mr. Williams.

Q. What marshal had it?

A. I don't know, sir.

Q. Was it in the public road that you met these parties?

A. Yes, sir.

Q. You stated to him plainly that you were a United States officer?

A. Well, sir, when he asked me who in the hell I was, I told him I was a deputy United States marshal, and he went for his big pistol, and brought it around by his side, and cocked it, and just as soon as I could get my pistol I fired.

Q. How long were you acquainted with the character of these Nelsons—about their character for order and peace?

A. Well, sir, all the talk that had been talked to me about these Nelsons was that this one that was shot had been a blockader for fourteen years, and that he was a bad man, and when I met the men I did not know them; I didn't know them personally. I was on the lookout for the Nelsons. Mr. Huffman told me the two men was there the night before. I was sick with the grippe, and the man I stayed all night with as I went over said that two men were out there. I asked him who they were, and he said he hadn't seen them, but he supposed they were the Nelsons.

Q. Haven't they been over about the furnaces there, and hadn't you heard of their characters?

A. Yes, sir.

Q. You live in Smyth county?

A. Yes, sir.

Q. Have you real estate there?

A. Yes, sir.

Q. If you should be admitted to bail, have you any idea much of running away?

A. No, sir; if I had wanted to run I would have done it before now. I went and turned myself over to the officers and told them what I had done. When I got to the top of the hill, and he remarked that man was killed, I said we will go back

and see about this thing; and we saw his brother go and turn him over, and Finlay says: "They don't like Revenues very much in this country, and they might come and kill both of us," and said, "Let's go on," and we went on towards Marion: and I told him I was going to Marion and would give myself up, and I come on to Marion, and my wife was sick, and I told Mr Dickenson (?) if anybody come after me, just to send some boy after me, and I would come, and I went on home to see my wife, and I was sick when the constable come for me.

Cross-Examined by Mr. Dickenson:

Q. Who was present when this shooting occurred?

A. They was Mr. George Finlay there, and the man that had the keg—I have understood since that it was Reuben Nelson.

Q. Did you know the man you shot at the time you shot him?

A. No, sir; I didn't personally know him. All I knowed was the pistol when I seed it.

Q. When this tragedy happened, where did you go that night?

A. I went to Mr. Cress's.

Q. Didn't you tell Mr. Cress you had killed a man, and didn't know who he was?

A. Yes, sir.

Q. Didn't you quit the public road and come through the fields?

A. No, sir; I did not. I went to Mr. Cress's because I knowed him, and had stayed there several times.

Mr. Dickenson—Well, that is all right. You had a right to do that, for it is only about 14 miles by Captain Williams'.

Q. Didn't you insist that the old gentleman where you stayed that night should bar all the doors that night? Didn't you ask him to bar all the doors that night?

A. No, sir; not a word of it. I said to his wife, in starting to bed with my prisoner that I had—we slept up stairs—and I

told her to shut the stair door that night, for fear my prisoner would come down and get away while I was asleep.

Q. Although you had killed a man, you thought you could sleep sound?

A. I hadn't a scruple over it, because I believed he would have killed me if I hadn't killed him.

Q. Have you given the names of all that saw this thing?

A I have given all that I know of that saw it. There was a little house down on the side of the road, and somebody might have been down there. We met some children just as we got across the top of the hill.

Q. You fired on this man and took his life—so you have been informed—without any more provocation than you have stated?

A. I thought he was going to kill me. I didn't arrest him. I told them to hold up, and I told them I understood that they had been selling whiskey, and at that time this man told me "No damned marshal should arrest him."

Q. How much real estate have you got?

A. Well, sir, I haven't but a very small portion of land. I am a very poor man.

Q. How much land have you got?

A. Only a three-acre lot.

Q. Have you got the legal title to that?

A. No, sir, I owe $20.

Q. Although you saw that man lying there, you didn't go back to see about him?

A. The reason I didn't was the proposition that my prisoner made me, that the people were drunk back there in the neighborhood and that they didn't like Revenues, and that they might kill us both.

Q. Do you know whether he died instantly or not?

A. All I know about that is that he fell back with his pistol in his hand. He sorter fell over that way [indicating], and then fell flat down, and Mr. Finlay says "That man is dead."

Q. Didn't he ask you for your authority for his arrest?

A. No, sir, he didn't.

Q. And the only question he asked you is what you said above, and you shot him?

A. He said, "Who are you—who in the hell are you," and he just went for that big pistol. And just as he brought it down here [indicating by his side] I sorter put my pistol around the horse's head and shot him.

Q. Is that all the trouble you have had since you have been in the revenue business?

A. Only once, I followed a fellow to Seven-Mile Ford.

Q. Had you been drinking whiskey that day?

A. There was about half a pint of whiskey—not whiskey, but brandy—in a bottle when we left Independence that morning. I was sick all the way with the grippe. I was sick the day I left home, and didn't want to make the trip, and —— said he would rather for me to make the trip.

The next witness, George Finlay, being duly sworn, testified as follows:

Question by Mr. Blair: Just tell all from the beginning to the end of this thing, and talk so the court can hear you?

A. Well, sir, we were coming across from Independence on the 11th, and when we come over into what is called the Rye Valley we saw those fellows that he was speaking of at Mr. Bumgardner's.

Q. Was not the man that was shot in that crowd?

A. No, sir, he was not in the crowd then; and this man come out and asked us if we had seen arry fellow going down the road with a keg; that a man had been down there with a keg, and he had rode very brief to try to catch him, to get some whiskey, and the fellow stated that he had been at a corn-shucking down there, and that he supposed this fellow that had the keg was ahead all the time, and that we would meet them in the road, and we went on, I reckon, not exceeding a mile, and saw two fellows coming, and I remarked that there comes

them fellows with the keg, and we went on and met them and spoke, and Mr. Carrico asked them what they had.

Mr. Blair: What was the first word he spoke?

A. I think he said, "What have you got there?" I think he repeated it, and then one of them said, "A little whiskey," and one of them checked up and was moving around like he was going around the horse: and Mr. Carrico said, "Hold on; I want to see what you have got." And the man that had the keg said, "What have you got to do with it?" and Mr. Carrico throwed his pistol on him, and about that minute this Nelson that was killed was standing sorter in front of Mr. Carrico's horse, got a pistol out of his pocket, and said to Mr. Carrico, "What did you do that for?" and he said, "I am a deputy marshal," and James W. Nelson, the one that was killed, said, "What authority have you got for this?" and then Mr. Carrico, just in an instant, shot his pistol out and said, "Here it is, God damn you!"

Q. He had his pistol in his hand, did he?

A. Yes, sir.

Q. He would have shot him if Carrico hadn't fired when he did, wouldn't he?

A. I don't know about that.

Q. And you told Carrico at that time you thought the man meant business?

A. I thought he meant to defend himself.

Q. You saw him fall with the pistol in his hand?

A. Yes, sir.

Q. What kind of a pistol was it?

A. It looked to me like a Colt or a Navy.

Q. Did you see him afterwards when you went up the road?

A. Yes, sir; we went on very brief; we went, I reckon, a hundred yards to the top of the hill.

Q. Did you see him with the pistol in his hand?

A. Yes, sir.

Q. Before he fell?

A. Yes.

Q. He didn't fall instantly, did he?

A. Yes, sir; almost instantly.

Q. Did he get up?

A. He tried to get up, and raised up that way [indicating], and then fell back flat.

Q. Did you go with Carrico that night?

A. Yes, sir.

Q. Where did he stay?

A. At Mr. Cress's, I think.

Q. He delivered you there at Marion?

A. He delivered me to the jailer.

Cross-examined by Mr. Dickenson:

Q. This man that had the keg was not shot—it was the other one?

A. Yes, sir, it was the other one.

Q. Was the man that had the keg doing anything?

A. No, sir.

Q. Tell us, then, whether it was at the time that Carrico had his pistol on Reuben that James Nelson pulled his pistol?

A. Well, sir, it was just a second after he put his pistol on Reuben that the other Nelson said, "What authority have you got for this"—that is the very words, I think; and Mr. Carrico said, "Here it is, God damn you"—and as he spoke the words he fired, I think.

Mr. Blair:

Q. Mr. Carrico had his pistol on the man that had the keg, and this other man that was shot pulled his pistol, and said, "Where is your authority for this thing"; what else was said?

A. I don't know that he said anything else.

Q. Do you know that he told this other one to go on?

A. No, sir, I don't recollect.

Q. And this man that was shot had his pistol out by his side, and aiding the one that was shot?

A. Well, he done just what I said. He had no pistol. The

one that was shot had the pistol out by his side, and says, "What did you do that for?"

Mr. Dickenson:

Q. He never drew his pistol until Carrico pulled his on the other man with the keg?

A. No, sir.

Q. And then shot him?

A. Yes, sir.

R. Crockett, being duly sworn, was examined as follows:

Q. Where do you live?

A. I live on Cripple creek, in Wythe county.

Q. What business have you been in?

A. I have been in the furnace business for seven years up to the last three years.

Q. Are you acquainted with the general character of James Nelson and Rube Nelson?

[Objection by attorney for the Commonwealth.]

A. All that I know about him was that he used to cut cord wood for me, and was said to be a pretty bad fellow; I never had no trouble with him myself.

Q. What was his general reputation for selling liquor around those furnaces?

[Objection by prosecution.]

Q. Have you ever had occasion to run this man off from your furnaces?

A. I never saw him with any whiskey but one time, and that was ten years ago this winter, I reckon. He came to a coaling ground of mine.

By the court:

Q. What is his reputation recently?

A. I don't know.

Mr. Blair:

Q. You did run him off from your coaling ground?

A. I tried, but he didn't run; I took eight or ten men there, but he didn't run.

Q. And was selling liquor right there on your premises and on your grounds?

A. Yes, sir: right there and then.

Cross-examination waived.

R. C. Williams, having been duly sworn, was examined as follows:

By Mr. Blair:

Q. You live in Smyth county?

A. Yes, sir: in Smyth county—Rye Valley.

Q. Tell the court if you are acquainted with the character of these Nelsons, and whether or not they were dangerous men from their general character?

A. I believe, in the ordinary way of expression, they were considered as outlaws.

Q. Were they habitual breakers of the law?

A. Yes, sir; I suppose in the last five years they have passed my place twenty times with liquor.

Q. What is their reputation for resisting officers?

A. That is their reputation, that they would resist officers.

Q. How long have you known Mr. Carrico?

A. I reckon, since the war.

Q. Have you ever heard anything about his peace and good order?

A. I never heard anything—only that he was a peaceable citizen.

Q. What was his reputation as an officer—he was a terror to law-breakers, wasn't he?

A. I always heard that he was a good officer, and that they were always on the lookout for him.

Q. Law-breakers were on the lookout for Carrico?

A. Yes, sir.

Cross-examined by Mr. Dickenson:

Q. How close have you lived to him, captain?

A. In nine or ten miles.

Q. And you have known him since the war?

A. I think so.

Q. Don't you know that he lived for years as a violator of law?

A. No, sir.

Q. Don't you know that he lived as a pedler without paying license?

A. No, sir; I know he was a pedler, but I don't know anything about the balance.

Stand aside.

Mr. —— James, being duly sworn, was examined as follows:

By Mr. Blair:

Q. What business have you been engaged in on Cripple creek?

A. I have been engaged in the furnace business.

Q. Are you acquainted with these Nelsons?

A. I have known them for several years.

Q. Did you consider them bad men, from their reputation or otherwise?

A. In what respect?

Q. As violators of the law—selling liquor, and so forth?

A. Well, they would sell liquor, and were in almost all kinds of meanness they could get into. I know they would sell liquor.

Mr. Williams recalled by Dickenson:

Q. You say these men were blockaders; were both of them?

A. I have seen them there together.

Q. And you put them both in the same category?

A. Yes, sir; I never bought any from them.

Q. And you were on the last grand jury in this court?

A. Yes, sir.

Q. Why didn't you indict them?

A. I said I never bought any from him.

Clay Wolfe, having been duly sworn, testified as follows:

By Mr. Blair:

Q. Do you live in Smyth county?

A. Yes, sir.

Q. How near do you live to Mr. Carrico?

A. Within less than a quarter of a mile.

Q. How long have you known him?

A. For eight—may be, ten years.

Q. What is his character as a law-abiding citizen?

A. I have never known him as anything but a good, peaceable citizen.

Q. What kind of an officer is he?

A. He is regarded as a very good officer. Blockaders, they say, dread him.

Q. Respectable people have respect for him?

A. Yes, sir.

Cross-examined by Mr. Dickenson:

Q. You say blockaders dread him?

A. Yes, sir.

Q. Do they think he will arrest them or shoot them?

A. Arrest them, of course.

Mr. J. Harris, having been duly sworn, was examined as follows:

Q. You reside in Smyth county?

A. Yes, sir.

Q. How far do you live from Mr. Carrico's?

A. Less than a mile.

Q. How long have you known him?

A. I couldn't tell exactly, but several years, though.

Q. Tell the court if you are acquainted with his character as a peaceable and quiet citizen?

A. I have had a right smart dealings with him, and he has always been a prompt man. I never heard anything else.

Mr. James, being duly sworn, was examined as follows:

Q. Where do you live?

A. On Cripple creek, in Wythe county.

Q. Are you a merchant there?

A. I have been—yes, sir.

Q. State the reputation of these Nelsons as to law-abiding citizens?

A. I never knew them myself.

Q. What is their reputation?

A. It is bad.

Q. Are they regarded as law-breakers?

A. Yes, sir.

Mr. —— Stout, having been duly sworn, was examined as follows:

Q. You live in Smyth county?

A. I live over at the Dead Mines; have been there about three months.

Q. Tell the court if you met the deceased at a church a short time before he was killed, and what he was doing.

A. I met him there about two or three weeks before he was killed—I never took any particular dates. He had liquor.

By the court:

Q. How far was that from where this affair took place?

A. I couldn't tell you that.

Mr. Blair:

Q. How much did you get from him?

A. I got a gallon.

Q. Where was it?

A. At the Sugar-Grove church.

Q. Was it the Baptist church?

A. It was right there before the post-office (?).

Q. How far is that from where this took place?

A. I don't know.

[It is agreed to be about five miles distant.]

Q. You got a gallon on Sunday, there at the church?

A. Yes, sir.

Cross-examined by Mr. Dickenson:

Q. Was there any preaching there that day?

A. No, sir.

Mr. —— Williams, having been duly sworn, testified as follows:

Q. Did Carrico surrender to you?

A. Yes, sir; he came to my house and surrendered, and I told him he had better wait there at my house, and he said his wife was sick, and he wanted to go and see her; and if any body come for him, to send for him. Mr. Carrico and Mr. Findlay made about the same statement to me as to what happened the morning he surrendered.

Q. How long have you known Mr. Carrico?

A. About ten or twelve years.

Q. What kind of a peace officer has he made?

A. He has made a first-rate officer, not only as a commissioner, but attending to other court papers.

Q. Do you know the general character of the Nelsons?

A. No, sir; but it had been reported to me on Saturday morning before this gentleman was shot, that they were over there selling liquor. I was inquiring for some gentlemen, and J. Askley told me.

By the Court:

Q. Did he designate these men as the men selling over there?

A. Yes, sir; I was inquiring about some gentlemen, and he told me this; and I told him if he would come before me and take oath to it, I would send it to Mr. Bailey. He said this man by the name of Nelson is a very bad man, and if I was to report him he might do me some damage.

Captain Williams recalled by Mr. Blair:

Q. Do you know any thing about this Nelson man, that he would not be arrested by a United States officer?

A. Nothing—only hearsay.

—— Fulton, a small boy, was next sworn and examined as follows:

Q. Did you see this thing occur?

A. Yes, sir.

Q. Now tell the court what you saw about it.

A. I was coming through the field, and I heard these men saying something, and I couldn't tell what they said, and I saw Mr. Carrico shoot Mr. Nelson, and I saw Mr. Nelson fall.

Q. How far were you from them?

A. About 245 steps, I reckon.

Cross-examined:

Q. You were in plain view of both them?

A. Yes, sir; in plain view.

Q. Could you see the body of Carrico?

A. Yes, sir.

Q. And the body of Mr. Nelson?

A. Yes, sir.

Q. Did you see their hands?

A. No, sir.

Q. Did you see Mr. Nelson have a pistol?

A. No, sir.

Case adjourned until January 8th, 1892, and the prisoner allowed bail in the penalty of $3,000, with surety.

EVIDENCE AT JANUARY SPECIAL TERM, 1892.

Commonwealth of Virginia
vs.
J. H. Carrico.

January 9th, 1892.

Upon the calling of this case the Attorney-General for the State of Virginia moved the court to allow the return of the officer to be amended, which was done; and also that the officer be allowed to insert Exhibit "B," which is a transcript of the proceedings of the County Court of Smyth county, Va., as well as a copy of the true bill found against the prisoner for murder.

J. H. Carrico, the prisoner, was then sworn and examined as follows:

By Mr. Blair:

Q. What official position did you hold under the United States Government on the 11th of last December?

A. I was a deputy marshal, sir.

Q. For this district?

A. Yes, sir.

Q. Under John G. Watts?

A. Yes, sir.

Q. Well, tell the court if on that day it was necessary for you to shoot one Nelson; and if so, state the facts?

A. I went to Independence on the 10th of December last for George Finlay, to bring him to Smyth to serve out a sentence, and on the morning of the 11th I come across the Iron Mountain, and got to the place about four o'clock, over on this side of the mountain, and a fellow by the name of Bumgardner called me from a house near by the road, and asked where I had been, and I answered him, and rode on; and the prisoner said he called me again: and then he come up and asked me where I had been, and I told him I had been to Independence

after this man; and the prisoner asked him if he had any whiskey, and he said he hadn't—that he had been trying to get some, and he had been to a corn-shucking over there, and that there was a man in the road just not more than fifteen minutes ahead of us, and that he had come over the road and tried to catch him; and he asked us if we had seen him, and we told him we hadn't, and he said then he must have dodged him. We went on then—not more than half a mile, I think—and the prisoner looked up and saw them, and said, "There they come—two men with a keg"; and we went on up, and I asked them what they had, and this one said they had a little whiskey, or liquor, I couldn't say which. This man kept going, and the other man asked me "who in the hell I was," and I said, "I am a United States deputy marshal," and he went back and got his pistol out of the scabbard and said, "No damned marshal can arrest me." And I got my pistol and shot. I had had my pistol in my hands all the way from Independence.

Q. How many horses did you have?

A. The prisoner would ride my horse part of the time, and I would walk. I was sick with the grippe at the time.

Q. I would like for you to show the court the actions of James Nelson when you shot him.

A. Well, sir, he come down the right-hand side of the road, and he had stopped about opposite my thigh on my horse; and the prisoner was just a little in front of my horse, and when he brought out his pistol I heard it crack, and I was confident it was that pistol, and I found it was.

Q. What was the noise you heard?

A. I was sure it was that pistol.

Q. Well, sir, after you shot him did you see any pistol in his hand?

A. Yes, sir; at the crack of the pistol the horse sprung forward up the road, and Mr. Finlay appeared to be getting up the road just as fast as he could, and my horse went at it fast, and I just let him go. I saw him with the pistol in his hand, and he seemed to be trying to get up the bank, and then he

tried again and fell back. Mr. Finlay said, "I believe that man is killed," and I said, "Yes, I believe he is, but I couldn't set on my horse and let a man kill me," and he said, "Yes, I believe he meant business." [Objection by the Attorney-General.]

Q. Where did you stay all night that night?

A. I stayed with an old gentleman by the name of Cress; I don't know his given name.

Q. Well, what disposition did you make of yourself next day?

A. Well, sir, I went to Mr. Cress's and put up my horse, and told him what had occurred. I stayed all night there, me and the prisoner.

Q. When did you go to Marion?

A. The next morning.

Q. Were you arrested, or did you surrender?

A. I went on to town the next morning. I started pretty early, and Mr. Cress told me——

By the Court:

Q. Just tell what you did?

A. I went to the commissioner and told him what I had done.

Q. Just tell what you did—did you surrender?

A. Yes, sir.

Q. How long after you got to Marion?

A. Just as soon as I got to Marion.

Q. Who did you surrender to?

A. Commissioner Williams.

Q. Did the constable come after you?

A. Yes, sir.

Q. How far do you live from Marion?

A. About two miles.

Q. How long have you been a United States deputy commissioner?

A. About two years—something about two years.

Q. Had you ever had any trouble or difficulties with this man Nelson?

A. No, sir.

Q. Any breach between you?

A. No, sir; none that I know of.

Q. Had you any personal acquaintance with either James or Reuben Nelson?

A. No, sir; I had no personal acquaintance; all I knew was what I had heard.

Q. State what information you had received in regard to these men selling liquor up and down the road?

[Objection by counsel for the State of Virginia. Objection overruled.]

A. I had heard by several men that there were some Mr. Nelsons that took liquor in the Valley, and that one of them was James Nelson.

Q. Now state what you had heard as to his character as a desperate man?

[Objection by Mr. Scott.]

Q. Now state to the court whether you regarded Rube and James Nelson as desperate men?

A. I don't know that I had ever heard anything said about Rube Nelson, but several men had told me——

[Objection by Mr. Scott, and witness stopped.]

Q. Now state what you had learned before that time in regard to James Nelson?

A. In regard to being a dangerous man?

Q. Yes, sir.

A. Well, there was a man by the name of Hutton—I don't know, but I think he was a——

By the court:

Q. State your information as to whether he was a dangerous man or not?

A. Yes, sir; I had heard that he was a dangerous man.

Mr. Scott:

Q. Did you regard him as a dangerous man?

A. Yes, sir; from his reputation I did regard him as a dangerous man.

Mr. Blair;

Q. Did you hear that he had shot other men?

A. Yes, sir.

Q. Did you have information that he had shot a man before that time?

A. Yes, sir.

Q. Had you heard that he and his brother had a difficulty?

A. Yes.

[Above question objected to by Mr. Scott, and objection sustained by the court.]

Q. Tell the court whether or not, when you met these men in the road, you believed they were the Nelsons, and if so, what was the ground of your belief?

A. I had a right good description of Jim Nelson, and I thought it was him.

Q. Did they give you their names?

A. No, sir.

Q Did you have information that they had been selling liquor up there frequently?

A. Yes, sir.

Q. You had information that they had been selling up and down the road?

A. Yes, sir.

Q. Now state to the court, as near as you can, what the appearances of this man were to you at the time you fired on him?

A. Well, sir, he went back to his pocket when he made the remark to me that no damned marshal should arrest him, and I thought I heard the pistol cock just as he brought his hand around this way [witness showing position of hand, &c.].

Q. Were you under the belief that he was going to kill you if you didn't shoot him?

A. Yes, sir.

Q. Did you ask them what they had in the keg?

A. Yes, sir; I asked Reuben, and the one that had the keg had gone on.

Q. So the man you shot was not the one that had the keg?

A. No, sir.

Q. So the man you shot took up the case for the other man?

A. Yes, sir.

Q. Did you have any help at all?

A. No, sir. I had the prisoner I had gone after there to look after, too.

Cross-examination:

Q. You were duly appointed a Deputy United States Marshal?

A. Yes, sir.

Q. You act under the district marshal--that is, under Mr. Watts?

A. Yes, sir.

Q. You had arrested the prisoner, and was in the discharge of your official duty on the highway?

A. Yes, sir.

Q. I understood you to say that you did not know the Nelsons when you met them?

A. No, sir; I didn't know them. I thought it was them, and wanted to see who they were.

Q. Your questions were addressed to the one that had the keg?

A. Yes, sir.

Q. What was his reply?

A. He said he had a little whiskey or liquor.

Q. Did you tell him you wanted him as a vendor of illicit whiskey?

A. No, sir.

Q. Did you tell him you wanted him at all?

A. No, sir; I don't think I did.

Q. There were no words between you and the man that had the keg?

A. No, sir.

Q. And he was the man that was killed?

A. No, sir; he was not.

Q. Will you please state to the judge again what occurred between you and Jim Nelson?

A. Well, sir, when I met these men, and it had been reported to me that they were selling liquor down there, and I asked this man what he had in the keg, and this man that was shot said, "Who in the hell are you?" and I said, "A deputy United States marshal," and he said no damned marshal should arrest him, he went back for his pistol——

Q. And you said nothing only what you have stated here?

A. I think I have told it all.

Q. About the pistol—what kind of a pistol was it?

A. A large pistol.

Q. Where is it?

A. I don't know.

Q. And still you can say it was a large pistol?

A. Yes, sir; it appeared to me to be what I call a large pistol.

Q. Well, you describe it?

A. Well, sir, I couldn't do that.

Q. How far was he from you?

A. About four or five feet.

Q. I thought you said you had that pistol in your hand all along the road?

A. Yes, sir; I had ridden with it for miles. I had it as a means of guard, and when I met these men I had it in my hand on the saddle.

Q. And when he said to you that no damned United States marshal should arrest him, then you fired?

A. When he said that I thought I heard a pistol click, and his hand was back, and I raised my pistol and fired.

Q. Wasn't he right by your side, and you on your horse?

A. Well, sir, he was just a very short distance from me.

Q. About four or five feet?

A. Yes, sir; four or five feet.

Q. After you fired what did you do?

A. Well, sir, my horse sprung forward, and the prisoner went up the road, and I could have stopped my horse, but I went on after him, and when we got to the top of the hill I stopped and looked back.

Q. How far was that?

A. Forty-five or fifty yards.

Q. What did you see at the distance of forty-five or fifty yards?

A. He fell the last fall he fell as I looked back.

Q. He didn't fall at the crack of your pistol?

A. No, sir; I saw him fall twice, and he had the pistol in his hand.

Q. And you saw the pistol still in his hand?

A. Yes, sir; the time my prisoner said that man is killed.

Q. Did you turn back?

A. No, sir: we saw his brother come to him. I proposed we would go back.

By the court:

Q. State whether or not you went back? And if not, why you didn't go?

A. Well, sir, the reason I didn't is this: when I saw him fall with the pistol in his hand, I thought he was dead, and I told my prisoner we would go over there to Pennington's and stay there, and see about the man, and he said, "It is a dangerous thing to do," and he said, "Don't you know we have just passed a lot of men drinking, and they might get together and kill both of us?" and we went on up about four miles and stayed at Mr. Cress's.

Q. When were you arrested?

A. On the evening of the 12th.

Q. The day after the shooting?

A. Yes, sir.

Mr. Dickenson:

Q. What day did you go over after the prisoner?

A. I got there on the 10th.

Q. And you left on the 11th?

A. Yes, sir.

Q. What time in the morning did you take the prisoner, Findlay, out of the jail?

A. I reckon about 8 or 8:30; I don't know exactly.

Q. You took him without his being discharged by a marshal?

[Objected to by D. F. Bailey, Assistant District Attorney for United States.]

By the Court:

Q. You have stated that you had this man in your possession. Where did you get him?

A. Well, sir, I had him on a mitimus for him. He was committed on two mitimuses—one to serve over there, and the other in Smyth county. I wrote Col. Craig to know what I must do, and he (Col. Craig) wrote to me to go there and get him.

By the Court:

Q. You had a legal process for this man Findlay?

A. Yes, sir; and the jailer told me to go and get him.

By the Court: As I understand this case, there were two mitimuses—one for Grayson and one for Smyth county?

A. Yes, sir.

Mr. Dickenson:

Q. You went on with your prisoner towards Marion on the morning of the 11th?

A. Yes, sir.

Q. Where did you get your breakfast or dinner?

A. I don't know the man's name; the prisoner said Phipps, I think. I was sick with the grippe at the time.

Q. When you got along about two miles from Independence didn't you fire your pistol into Mr. Dickey's turkeys?

A. I fired off one chamber at a stump.

Q. Wasn't you very drunk.

A. No, sir.

Q. What was your condition when you got to Phipps's?

A. I was sick, and told him so.

Q. Didn't you tell him what a good shot you were?

A. Well, sir, there was a talk got up about pistols there, and he showed me his pisiol, and I may have showed him mine.

Q. Were you not very considerably under the influence of liquor when you took your meal at Phipps's?

A. No, sir; I was not.

Q. Didn't you then and there exhibit a pistol, and tell him you could knock the bottom out of a pint cup forty or fifty yards distant?

A. I don't remember that I told him that.

Q. Didn't you then and there say that you could knock the bottom out of a pint cup forty or fifty yards distant?

A. I told you that I didn't remember.

Q. You do deny positively that you were under the influ- of liquor?

A. Drunk, do you mean? I can tell you how much whiskey I had. I don't get drunk, but a cousin of mine gave me a bottle full of apple brandy. Some parties asked me if I didn't have some liquor, and I had this little beer bottle in my pocket, and I pulled it out and give them a drink of liquor out of this little beer bottle, and that was all we had had on the way to Marion, and a drink a man gave us on the road.

Q. You deny that you were under the influence of whiskey when you got to Phipps's?

A. Well, sir, before I got to Phipps's a man gave me and Geo. Finlay a dram, and George drinked the most of that. I had taken very little whiskey, and I don't know exactly what you call under the influence of whiskey. I had taken a dram, and that is all I know to say about it.

By the court:

Q. What time did you get to Phipps's?

A. I don't know what time. I didn't eat any breakfast that morning. I reckon it might have been about ten o'clock—I can't say positively.

Q. How far did you travel?

A. It was about seven miles, I reckon.

Q. It was about seven miles from Independence?

A. Yes, sir, I reckon it was.

Q. Next you passed Wilson's store?

A. Yes, sir.

Q. Wasn't you under the influence of whiskey?

A. Only what I have told you is all I know to tell.

Q. Didn't you ask for whiskey along the road?

A. Mr. Findlay said, sir, as we come along, that the prisoners in jail told him there was a place at what they called the Cross-Roads where they kept whiskey, and we asked some men there if they kept whiskey there, and they said "No," and we went on.

Q. When you crossed the mountain and came down on this side, you asked for whiskey there?

A. No, sir; Mr. Findlay may.

Q. And you came up to where you met Bumgardner, and——?

A. Yes, sir.

Q. Then you met Bumgardner?

A. Well, sir, when we got up to the store I got a dollar changed to pay a fellow that I owed, and when we got out a few hundred yards we saw some fellows out in a yard, and Findlay said "Those men are drunk," and I said, "I think not." And they spoke, and I said, "How do you do, gentlemen," and went on, and when we got past them the prisoner said one of them called me, and I turned around, and one of them appeared to be drinking, and asked me where I had been, and I told him, and he said he heard I went over the day before. I told him I went over for Mr. Findlay, and he said, "If you don't watch, some of these men will get you," and I had this pistol in my hand, and I put it up and said, "I am pretty well fixed."

Q. Now, you met Bumgardner at Brewer's (?), didn't you?

A. I don't know who lived there.

Q. That is where the man said Carrico, isn't it?

A. Yes, sir.

Q. And you drew your pistol on him?

A. No, sir; I had my pistol in my hand, and said I was pretty well fixed.

Q. You say he told you the Nelsons were over at the corn-shucking.

A. No, sir; he didn't tell me the Nelsons were there. He said something about being over at a corn-shucking, and that some men had been there with some whiskey, or liquor.

Q. Did you or not accost these men on the statement of Bumgardner?

A. Yes, sir. He said there was a party just ahead of me on the road, not more than fifteen minutes ahead of us.

Q. Now, then, he told you that he had been told there was some blockaders just ahead of you?

A. Yes, sir.

Q. And that caused you to arrest the Nelsons?

A. Yes, sir; that put me on the lookout for them.

Q. Didn't you say that he had been at Pennington's at a corn-shucking?

A. I said he was over there at a corn-shucking.

Q. And that they were selling liquor over there?

A. No, sir; not that way.

Q. Then we have got to this, that Bumgarner told you that somebody told him that somebody was ahead selling liquor. Did you have any warrant for the Nelsons?

A. No, sir.

Q. Then you met two men travelling along the road that you believed were Nelsons?

A. I believed one of them was Jim Nelson, but I didn't know it.

Q. What did you say to the Nelsons when you met them?

A. I told them to hold on; that I wanted to see what they

had in that keg; that it had been reported to me that they were selling liquor over there.

Q. Didn't you say to your prisoner that you were going to arrest them before you got up to them?

A. I don't recollect what I said to him about that exactly.

Q. Do you swear to this court that Nelson fell with that pistol in his hand?

A. I do; yes, sir.

Q. Didn't you state to Daniel Blankenbeckler, on the day that you passed his house with your Winchester rifle, that he had his pistol on you?

A. No, sir; I didn't tell him that he had his pistol on me. I told him he went back and got his pistol, and cocked it on his thigh, and I shot.

Q. Will you state to this court here, now, that he didn't have his pistol on you when you shot?

A. No, sir; he didn't.

Q. Couldn't you have put your pistol on him?

A. I don't know, sir. I shot him when he was cocking his pistol, and he brought it out in a rush.

Q. You say he had his pistol down, and you had the drop on him?

A. I didn't have the drop on him at that time.

Q. He didn't have his pistol on you at all?

A. He had it in this position [indicating by side of thigh].

Q. Could you have put yours on him and saved that man's life?

A. No, sir, I don't know that. When I shot him he was cocking his pistol in the biggest rush I ever saw.

Q. Then we will conclude this point this way—that at the time you shot Nelson he didn't have his pistol on you at all?

A. No, sir; he never did get it on me.

Q. Now, when you met these boys, and told one of them you wanted to see the one with the keg, you got out your pistol?

A. No, sir; I had my pistol in my hand when he come up.

Q. Now, when you told this man that had the keg that you wanted to see what he had, didn't this one that got shot ask you what authority you had for this?

A. I don't know that he asked me what authority I had, but he asked me who in the hell I was.

Q. That was James W. Nelson?

A. Yes, sir.

Q. Didn't he ask you what authority you had for arresting him?

A. Well, I remember that he said, "Who in the hell are you?" I don't recollect anything about the authority.

Q. What did you say when you were just in the act of shooting him?

A. I don't recollect that I said anything.

Q. When he asked you what authority you had, did'nt you say, "Here it is, God damn you," and fire on him?

A. I never said that. I don't use such words.

Mr. Blair:

Q. Are you a swearing man?

A. No, sir.

Mr. Dickenson:

Q. When the man fell, you and your prisoner left at once, didn't you?

A. No, sir. My prisoner started up the hill fast, and went up the road, and my horse started, and I could have checked him, but my prisoner was going on, and we went up the road forty or fifty yards and looked back.

Q. Then you went to Mr. Cress's, and then to Marion, and then surrendered to a United States marshal?

A. Yes, sir.

Q. Why did you surrender to him?

A. I thought it was the proper place for me to go.

Q. When did you do that?

A. As soon as I went to Marion.

Q. And he just told you to go home?

A. No, sir. I went there and told him about it, and my prisoner told him about it, and he said for me to go to bed; and my brother-in-law come in and told about my wife's condition, and I went home, and told him if they wanted me to send somebody for me.

Q. You went out to your home three or four miles, and the State officer came and took you and put you in jail? And that was the first time you saw inside the jail bars?

A. I don't know when I first saw inside of jail bars. I know you and Mr. Blair had a conversation there, and you told them to take me and put me in jail.

Q. Now, Mr. Carrico, didn't you tell Daniel Blankenbeckler that you ought not to have shot this man; that you were mistaken in your man?

A. No, sir. I told just what I had done.

Q. Didn't you admit this—that you are are a high-tempered and impulsive man, and do things you ought not to do?

A. No, sir; not that I know of.

Q. Didn't you tell Phipps that your son John was a good officer, but that you would kill a man in a minute?

A. I don't recollect that I told him that at all.

Mr. Dickenson:

Q. Didn't you live an inhabitant of Smyth and Washington counties as a violator of law—as a pedler without license?

The Court: The court wants all the information it can get on any point that bears upon the case, but this seems too remote.

Q. You admit that when you arrested this man in the road you didn't know who he was at all, and told him to halt; that you wanted to see what he had?

A. I didn't tell him that way.

Q. Did you have a warrant for this man?

[Counsel for Carrico admits that he had no warrant for the arrest of the deceased.]

Re-direct examination by D. F. Bailey:

Q. How many of you were present?

A. There was the two men we met and this prisoner.

Q. You say you were four or five feet from James Nelson?

A. Yes, sir.

Q. How far from him was Findlay?

A. Let me show you. [Here witness pointed out distance on table.]

Q. How many feet?

A. I don't know—seven or eight feet.

Q. Rube Nelson—how far had he gone?

A. When Jim got in this conversation, Rube went on as far as across this room.

Q. He had his face from you?

A. Yes, sir; I suppose so.

Q. How far was Jim Nelson from you?

A. He was about four or five feet from me on the right, and Findlay was seven or eight feet from me on the left hand, and Rube was going down the road about the length of this room from me.

Geo. Findlay.

By Mr. Blair:

Q. Were you present, on December 11th, when James Nelson was shot by Mr. Carrico?

A. Yes, sir.

Q. Why were you with Mr. Carrico at that time?

A. Well, sir, there was a mitimus against me, and he said he was carrying me from Grayson to Smyth county.

Q. How far is it?

A. I don't know; thirty or forty miles, I reckon.

Q. What time did this shooting occur?

A. About four o'clock.

Q. How far were you from Grayson county jail?

A. I don't know; I am not acquainted with the road. We travelled pretty steady all day—I suppose 20 or 25 miles.

Q. Please state your recollection of what occurred in the road when this shooting took place?

A. Well, sir, I saw two fellows coming down the road. One of them looked like he had a keg on his shoulder, and he remarked that he would arrest him or them, I don't know which. We went on up and met them, and Mr. Carrico said, "What have you got in there?"—perhaps he asked that question twice—and Rube said, "A little whiskey," and Rube tried to pass on, and he (Carrico) said, "Hold," and Rube said, "Who are you," and he throwed his pistol on him, and by that minute James Nelson, the deceased, was standing in front of the horse's head, pretty close, and jerked his pistol, and said, "What did you do that for? What authority have you got?" And Mr. Carrico said, "Here it is, God damn you," and fired.

Q. Did you hear any cocking of a pistol?

A. Yes, sir; I thought I heard a pistol.

Q. Had Nelson said anything to Mr. Carrico up to that time?

A. No, sir; I don't think he had.

Q. Had Carrico said anything to him?

A. Not that I remember. Rube was going on.

Q. Did James Nelson say anything until then?

A. No, I think not.

Q. And Jim jerked out his pistol, and said, "What did you do that for?"

A. Yes, sir.

Q. Did you receive any information before that time about these men being on the road; if so, when and where was it?

A. Well, we were coming on back down the road about a mile, and we saw some men, and one of them spoke to Mr. Carrico and called him by his name, and we went on, and one of them hollowed at him, and I said, "That fellow is calling you," and Bumgardner caught up, and they had a little talk, and I asked him if they didn't have any whiskey down there, and he said "No"; that a party was over there at a corn-shucking, and they thought they had hid from him; that they were not more than fifteen minutes ahead of us.

Q. When you saw these men coming down the road you remarked to Mr. Carrico, "There comes those fellows now."

A. Yes, sir.

Q. Did you, or not, think they were the men Bumgardner was telling you about?

A. I don't think he said men. I think he said fellows what were down the road with a keg, and about fifteen minutes ahead of him, and he had ridden very hard to catch him.

Q. You called Mr. Carrico's attention to him?

A. Yes, sir. I said, "There comes them fellows with a keg or something."

Q. What time did you leave Grayson jail?

A. I don't know; it was pretty early.

Q. Were you present when Mr. Carrico gave those fellows some whiskey in jail?

A. Yes, sir. It was something like a flask.

Q. Did it look like a beer bottle?

A. I didn't pay much attention to it. I don't know whether it did or not.

Q. Did you have any more whiskey?

A. We met a fellow and he gave us a little, and Mr. Carrico drinked a little, and I drunk the most of it.

Q. Was this one-half pint and that drink all you had that day?

A. Yes, sir.

Q. Was Mr. Carrico under the influence of whiskey that day?

A. I considered him so that morning when he came to Independence.

Q. Was that a cold day?

A. I don't recollect.

Q. You had gone between twenty and twenty-five miles?

A. I think so.

Q. At the time of this shooting, was Mr. Carrico under the influence of liquor?

A. I couldn't say about that.

Q. This one-half pint and this drink was all you saw?

A. Yes, sir; and that in the glass at the wagon I drunk.

Q. You say that you distinctly remember that James Nelson drew his pistol out of his scabbard?

A. I don't know what it was in. He drew it, I think, just out of his hip pocket, just that way [showing how it was done].

Q. Did you see the pistol in his hand after he had fallen?

A. Yes, sir. He staggered, and rose up, and then fell over with the pistol in his right hand; and he kept going until he fell, and the last I saw of him his brother was over him—I suppose it was his brother.

Q. How far did you go that evening?

A. I don't know exactly; I reckon about six or seven miles.

Q. What did Mr. Carrico say about the shooting as you went up the hill—anything?

A. Well, we were going up the road, and he said: "George, I couldn't sit on my horse and let that man shoot me.

Mr. Scott:

Q. He said that he could not sit on his horse and let that man shoot him?

A. Yes, sir.

Q. What did you say to him?

A. I said that I thought he meant business.

Q. From the bearing and attitude of this man James Nelson, did you think he meant to use his pistol?

A. Well, it looked so. I don't know what he meant to do.

Mr. Blair:

Q. Well, just go right on and tell what he said to you, or you to him, about staying there?

A. Well, Mr. Carrico had designated a place to stay, I think, right close there, and I remarked to him that we had better go on; that this man had a corn-shucking down there, and the people might get together; and he said he thought it was a good suggestion, and we went on to Mr. Cress's, six or seven miles.

Q. Where did you go next day?

A. Went to Marion.

Q. What did Carrico do with you?

A. Put me in jail.

Q. Did you know where he went himself?

A. No, sir; I don't know.

Cross-examined:

Q. Carrico said, "I couldn't sit on my horse and let that man shoot me," did he; and what did you say?

A. Mr. Carrico said, "I couldn't sit on my horse and let that man shoot me," and I said I thought he meant to defend himself, or something like that.

Mr. Dickenson:

Q. You said you thought he meant to defend himself?

A. That is my recollection, and I won't state positively that I said it that way exactly.

Q. When you left Independence that morning what was the condition of Carrico as to whiskey?

A. Well, sir, I thought he was pretty tight.

Q. Out about two miles, at Mr. Dicky's, what was his conduct there?

A. Well, sir, we were coming out there, and there was a gang of turkeys along the road, and I thought he fired his pistol off right in among the turkeys.

Q. Right in the public road?

A. Yes, sir.

Q. Was he still pretty tight?

A. I think so.

Q. What was his condition when you got to Phipps's?

A. I think he was tight.

Q. Did he get out his pistol at Phipps's?

A. Yes, sir.

Q. How many times?

A. A couple.

Q. What all did he say about that?

A. Well, he first said he thought his son was a good man in making arrests, but that he was a little excitable, and might be a little dangerous, and do things he oughtn't to do. He

then said he had some good pistols, and said, "I will show them to you," and went back to his overcoat and was showing them to Mr. Phipps.

Q. What about the tin cup?

A. I think he said he could knock the bottom out of a tin cup two rods.

Q. What did Mr. Phipps say to him?

A. He told him to turn the other end of that way.

Q. When you met Bumgardner, did he call the Nelsons' names at all?

A. I don't think he did.

Q. Didn't call them at all?

A. If he did I have no recollection of it.

Q. When you got in sight of these men, and you said, "There comes them men," did he say he was going to arrest them?

A. I think so.

Q. When he met them, didn't he put his pistol on Rube Nelson? Where was Jim?

A. I think he was just on the other side of the road.

Q. Was Rube doing anything?

A. I don't think he was.

Q. So it was then that James pulled his pistol and put it down by his side; that Carrico said, "Here it is, God damn you," and shot?

A. No, he didn't say, "God damn you"; I think he said, "Here it is, by God."

Q. And then shot him?

A. Yes, sir; and then shot.

The next witness, Gordon Carrico, being duly sworn, was examined as follows:

Q. Where do you live, Mr. Carrico?

A. I live in Grayson.

Q. Grayson county?

A. Yes, sir.

Q. Had you seen the Nelsons, or either of them, a short time before this shooting occurred?

A. Yes, sir; I saw Rube and James both, the day James was killed.

Q. Where did you see them?

A. At Riley Riner's (?), in Smyth county.

Q. How far from where James was killed?

A. Two miles.

Q. What time a day was it you saw them?

A. It was about 12 o'clock, and they left between 12 and 1 o'clock.

Q. What was he doing?

Mr. Scott: It is not a question of revenue.

The Court: This might show his animus towards the prisoner, and the prisoner had been informed that men were out violating the law, &c., &c.

Q. Then you say you did see them disposing of liquor there?

A. They were then disposing of liquor at that place. They had liquor there, but I didn't see them sell any. I saw them treat a man.

Q. State to the court in what way they were disposing of it?

A. They treated a little out of a bottle.

Q. Did you see them have any liquor?

A. They had a keg and a jug; I didn't see what was in them.

Q. How were they carrying it?

A. They had them in a sack, and at 12 o'clock James had them out between the cribs.

Q. Did they let anybody have whiskey in vessels?

A. I don't know. When we started out from dinner Mr. Pierce (?) asked us if we would like to have some whiskey, and he got us a bottle apiece.

Q. You saw them have a bottle and a jug both?

A. Yes, sir. I spoke to James Nelson, and told him he ought to be cautious, and he turned to his pistol, and said if they bothered him he would turn his Winchester on them.

Cross-examined:

Q. This was at Riley Pierce's, in Smyth county?
A. Yes, sir.
Q. What time?
A. It was after 12 o'clock.
Q. You say they had something in a bag?
A. Yes, sir; they had a keg and a jug in a bag.
Q. Did you see them?
A. Yes, sir.
Q. Did you know what was in them?
A. No, sir.
Q. Did you see them pour anything out of them?
A. No, sir.
Q. You wanted some whiskey, and Mr. Pierce got it for you?
A. Yes, sir.
Q. And you counselled the Nelsons to be careful what they were doing?
A. Yes, sir; and James said if they bothered him he would turn his Winchester loose.
Q. You did not only not see any liquor, but you didn't see anybody get liquor from them?
A. No, sir; I seed none, only what was in the bottle.
Mr. Bailey:
Q. What relation are you to the defendant?
A. I don't know, sir.
Q. Is it distant?
A. Yes, sir.
Mr. Bailey: Well, that is all right.

J. H. Carrico recalled:

By Mr. Blair:
Q. State to the Court if you were present at the last term of this court at this place?
A. Yes, sir.

Q. In your capacity as deputy marshal?

A. Yes, sir.

Q. Tell the Court if you heard read in court an indictment against James C. Nelson.

A. Yes, sir, I did.

Q. When you met those Nelsons in the road, what was your purpose in stopping them?

A. The only purpose I had, as I stated in my examination for bail, was to see who they were, and to see what they had in their keg. I had been told that there were men on the road along there selling liquor.

Q. Then you stopped them for this information?

A. Yes, sir.

Q. What did you intend to do with that information that you would get as to the contents of the keg?

A. To get the information and give it to the commissioner, and try to procure a warrant for their arrest.

Cross-examination:

By Attorney-General Scott:

Q. Did you say to Findlay, just before you met them, that "There they are. I am going to arrest them"?

A. I told him I was going to stop them and see what they had, is my recollection of the thing, sir.

The indictment referred to in the foregoing evidence was here presented, and also the indictments in two cases previous to this indictment.

T. T. Childers sworn for petitioner:

By counsel for petitioner:

Q. Where do you live?

A. In Grayson county.

Q. Did you know James Nelson (the man that was killed by Carrico) was killed?

A. No, sir, I did not.

Q. Do you know the day of the occurrence?

A. Yes, sir.

Q. Did you see James Nelson that day?

A. Yes, sir.

Q. Did he sell you any liquor; if so, how much?

A. I paid him for some liquor.

Q. How much?

A. Half a gallon. I paid him for it. He had another man with him carrying the whiskey, and Nelson said it didn't belong to him; it belonged to the other man.

Q. Did you engage it before, or buy it then?

A. I bought it then.

Q. What time of the day was that?

A. In the evening.

Q. Give the time. Give the best estimate you can.

A. About two o'clock.

Q. Tell the Court how far that was from the place where the shooting occurred, the way people travel.

A. I suppose about a mile and a half, and two miles and a half around.

Q. Were Nelson and the other man on foot?

A. Yes, sir.

Q. The way around as footmen travelled was one and one-half miles?

A. Yes, sir.

Q. That was about two o'clock in the afternoon?

A. Yes, sir.

Cross-examination:

Q. By Attorney-General: What day do you say this was?

A. I didn't say.

Q. You don't know what day it was?

A. I don't remember.

Q. Nelson said that this whiskey you speak of didn't belong to him?

A. Yes, sir.
Q. Didn't belong to him?
A. That is what he said.

Re-direct examination:

Q. Do you remember of his being killed afterwards?
A. Yes, sir.
Q. State whether or not it was on the day of the killing?
A. Yes, sir.

W. R. Pierce called and sworn:

Q. Tell the Court if you saw James Nelson, the deceased, on the day that he was killed?
A. Yes, sir; I saw him.
Q. Did you know him well?
A. Yes, sir; I was very well acquainted with him.
Q. You know he was the same man that was killed?
A. Yes, sir.
Q. Was he at your house the day he was killed?
A. Yes, sir.
Q. Was any one with him?
A. There was another man with him.
Q. Did they have any liquor?
A. Yes, sir; they had some liquor.
Q. How much did they have?
A. I couldn't say as to that.
Q. Did you get any of them; if so, how much?
A. One quart, I think.
Q. How did you pay for it?
A. It was about dinner time, and I started to dinner; they was there, and I was hurrying to have dinner, and pushing the hands who were working in the corn-field. They was down at the steps leading into the granary, and I went down there and throwed down some money, and said, "Give me a quart of liquor." That is all I know about it.

Q. You got the liquor?

A. Yes, sir.

Q. And they got the money?

A. I suppose they did.

Q. How far was that from where Nelson was killed?

A. Two and a half miles, I suppose.

Q. What time was it?

A. Just about dinner time—just after dinner; I suppose one o'clock in the day time.

Q. On the day of the killing?

A. Yes, sir.

By the court: How far do you live from the place of the shooting?

A. I suppose two and one-half miles.

Thomas Wilkerson sworn.

Q. Do you remember the day Nelson was shot?

A. I don't remember exactly the day, but I saw Nelson the day he was killed.

Q. Did you get any liquor from him that morning?

A. Yes, sir.

Q. How much?

A. He let me have a half gallon of brandy.

Q. How much did you pay for it?

A. I did not pay him anything. I laid a dollar down, and I suppose he got it.

Q. That was on the day he was killed?

A. Yes, sir.

Q. How far was it from the place of the killing?

A. About three miles and a half.

Q. What time of the day?

A. About nine o'clock in the morning.

Cross-examination:

Q. What is the distance, did you say, Mr. Wilkerson, from where you bought this liquor to where he was killed?

A. I think about three miles and a half; may be a little over that; I won't be positive about the distance.

Q. Who was with him when you got the liquor?

A. There was another fellow with him. He said it was his brother.

Re-direct examination:

Q. Did each one have liquor?

A. Yes, sir.

Q. Both had liquor?

A. Yes, sir; both were carrrying sacks, but James Nelson said it was his.

Q. In what sort of vessels was it?

A. Two jugs and a keg; the keg, I suppose would hold about two gallons.

Q. Where did these parties live?

A. In Grayson county.

Q. How far from you?

A. I don't just know.

William Pierce:

Q. Did you see James Nelson the day he was killed?

A. Yes, sir, I suppose I did.

Q. Do you know the place where he was killed?

A. Yes, sir.

Q. How far was it from that place?

A. Two and a half or three miles.

Q. About what time of the day was it?

A. He came there about twelve o'clock and left about one.

Q. Did he have any liquor?

A. Yes, sir.

Q. How much did he have then?

A. I don't know how much he had.

Q. Did he dispose of any there that day?

A. Yes, sir.

Q. Do you know where Nelson lived?

A. No, sir.

Q. He was frequently in that neighborhood, was he?

A. Yes, he had been in that neighborhood.

Q. What was he doing through there?

A. Working there—harvesting and wood-chopping.

Q. But he had liquor this time?

A. Yes, sir.

Q. How much did you get?

A. Half a gallon.

Q. How did you pay for it?

A. I laid the money down on the stair steps, and he asked me how much I wanted, and I said half a gallon, and he let me have it, and then he took his whiskey and went on down the road.

Q. You laid the money on the stair steps?

A. Yes, sir; the steps of the granary.

Q. And got a half a gallon?

A. Yes, sir.

Q. And paid him for it?

A. Yes, sir.

Q. How much did you pay him for it?

A. I paid him a dollar.

Cross-examination:

Q. Are you a son of W. R. Pierce?

A. Yes, sir.

Q. Is the liquor you speak of the same liquor he bought?

A. No, sir; this I told about was what he let me have.

Thomas Hutton sworn;

Q. Did you know James Nelson?

A. Yes, sir.

Q. Did you ever have a talk with him about his selling liquor, and about the danger of it?

A. Yes, sir.

Q. Where?

A. In Robert Ward's barn.

Q. State the conversation?

A. I wanted some whiskey, and asked him if he knew where any could be found, and we was talking about it; and while we was talking, he said that it was reported that Captain Williams had tried to take some liquor away from somebody, and he looked over towards Captain Williams, and said, if that man tries to get me in trouble, and take any whiskey away from me, and said if he done it once, it would be the last time he would do it; and then he took out a knife, about that long, and opened it [showing how, menacingly].

By the Court:

Q. Who was he speaking of?

A. Captain Williams.

Q. He said nobody could take the whiskey away from him?

A. He said Captain Williams couldn't; he didn't say as to anybody else.

Q. Did you say anything about it being dangerous business, and he might get into trouble?

A. Only about going over there to Captain Williams?

Cross Examination:

Q. You remarked then, did you, about Captain Williams taking whiskey away from a man?

A. Yes, sir.

W. R. Crockett sworn:

Q. Were you acquainted with James Nelson?

A. Yes, sir.

Q. How long had you known him?

A. I have known him about ten years this winter, since the first time I seen him.

Q. Were you acquainted with his general character, as to disorder?

A. Yes, sir; he was a dangerous man.

Q. What has been his general reputation?

A. As a dangerous, desperate, disorderly man.

Q. Did you ever talk with anybody about his character?

A. Most everybody that I ever heard speak of him considered him a dangerous man.

Cross-examination:

Q. How far did you live from him?

A. I reckon it is twenty or twenty-five miles.

Q. How often did you see him?

A. Sometimes it would be three or four months between times, sometimes I would see him oftener; he worked for me sometimes.

Q. How long have you known him?

A. About ten years.

Q. How long have you employed him during that time?

A. I reckon he cut wood for me at four or five different times. Once, about four years ago, as soon as I saw so much trouble he made in cutting this cord-wood, I told him I would never give him another job. The last year I had cord-wood cut he came back and wanted me to give him work, but I told him I didn't want anything to do with him.

Q. Will you tell how he gave this trouble?

A. In cutting this cord-wood he wouldn't chop the bushes off; he wouldn't split it, and wasn't an honest chopper; wouldn't do his work honestly; and when I would go into the wood chopping he would take to swearing and going on, and said no man should dock his wood. This means taking off so much of it as makes it right—taking off for what is not good.

Q. While he was in your employment, besides doing bad work, what else did he do?

A. There was no trouble except when you come to business with him.

Q. Did he get in any broils while in your employment?

A. Yes, sir.

Q. Do you know of any one particular trouble?

A. Yes, sir; that was excited by whiskey. The first winter I got acquainted with him he came into the wood chopping

where I had a lot of men chopping, and brought five or six gallons of whiskey. He come one Sunday, and I heard of it some time in the evening, and I got a crowd of ten or twelve men and scared him off, to keep him from making the men drunk and disturbing them in their work; and one of the men was to be a revenue officer, and said that we had come to take him: that we had come there to arrest him. He just took out his pistol and stated that he didn't propose to be arrested.

Q. What did you do?

A. Let him alone there. I had no authority to shoot him.

Q. That is the circumstance by which you estimate the man's character?

A. That was part it; the rest I know from what other people say.

Q. You say his character in that neighborhood was that of a dangerous, disorderly man?

A. Yes, sir.

Q. Do you know anybody else in that neighborhood that ever employed Mr. Nelson as a wood-chopper, &c.?

A. Yes, sir; Mr. J. W. Brown employed him, and A. L. Porter employed him; both are summoned here.

Re-direct examination:

Q. He turned on that other man that was going to arrest him?

A. Yes, sir; and I let him alone; we had no authority for arresting him.

J. W. Brown sworn.

Q. You were furnishing wood to run a furnace: which one—what name—what is it called?

A. Beverly.

Q. And the other?

A. Speedwell.

Q. Were you acquainted with James Nelson?

A. Yes, sir.

Q. How long have you known him?

A. About four years.

Q. Are you acquainted with his general character as a dangerous, disorderly man?

A. Yes, sir; that was his reputation with people that knew him.

Q. Give some instances.

A. Well, in 1888, he came to me for work—he and his brother and another man, named Dunn. They didn't put up wood to suit me; they wouldn't split it and wouldn't trim it, and I had trouble with him all the time. I told him a time or two I didn't care to have such men working there, and told him and the two other men they could leave. They were quarrelsome to do business with, and I had some few words with James Nelson several times, and at last got rid of them.

Q. What estimate did the people in the neighborhood place on him?

A. All that I know anything about says about as I do; I don't know anybody that don't say that of him.

Q. What was that character?

A. That he was a dangerous, bad man.

Cross-examination:

Q. How far did you live from him?

A. I don't know accurately; I suppose it was 25 or 30 miles from where I was doing business to where he lived.

Q. How often did you employ him?

A. Only the one time. I made up my mind never to employ him any more.

Q. Was he employed by the furnace men in your neighborhood after you dismissed him?

A. I can't say as to that. I was informed that he was going to Max Meadows, but I don't know.

Re-direct examination:

Q. That was the reputation he bore as you have stated it?

A. Yes, sir; that was it; he was considered a dangerous man and a bad one.

J. M. James sworn:

Q. Were you acquainted with James Nelson?
A. Yes.
Q. What was his general reputation as an orderly man, or was it bad?
A. Bad.
Q. What is his reputation then?
A. He was considered a very dissolute character.
Q. A desperate, dangerous character?
A. Yes, sir.

Cross-examination:

Q. Do you hold any office in this district?
A. Yes, sir.
Q. What is it.
A. Deputy collector.
Q. You are collector of the revenue derived from the manufacture and sale of spirituous liquors?
A. Yes, sir.
Q. Was the character of this man desperate on account of selling crooked liquor?
A. In part, yes; but I do not base it on that only. That is only part of it.
Q. What else have you ever heard against this man?
A. Nothing more than that he was a general blackguard.
Q. Did you ever get warrants for him?
A. No, sir; I never could get the proper witnesses against him.

Re-direct examination:

Q. How long have you been deputy collector?
A. About two years.

M. M. Stourt sworn:

Q. Will you tell the court if you knew James Nelson?

A. I didn't see him but once; I bought a gallon of whiskey from him that Sunday evening.

Q. Where was that?

A. Near the Methodist church.

Q. When did you say?

A. Sunday, about dark.

Q. How much did he have on hand at that time?

A. I paid him two dollars in money and left him.

Q. You didn't see him after that?

A. No, sir.

Q. Who was with him?

A. No one.

Cross-examination:

Q. Were any services being held in the church when you got the liquor?

A. No, sir.

Q. You were not there at church?

A. No, sir; I just happened to meet him, and he asked me if I wanted to buy any liquor.

Q. When was that—how long before the man was killed?

A. About three weeks.

Re-direct examination:

Q. He asked you if you wanted to buy it?

A. Yes, sir.

Q. Was that in Smyth county?

A. Yes, sir.

Re-cross-examination:

Q. How far from the place of killing?

A. I couldn't tell you.

A. J. Haga sworn:

Q. You live in Washington county now?

A. Yes, sir.

Q. Where did you come from?

A. Grayson county, Virginia.

Q. Did you know James Nelson?

A. I knew him.

Q. How long has it been since you came here? Did you know him here or in Grayson?

A. I couldn't tell you how long I have known him. I have known him ever since I can recollect.

Q. Were you acquainted with his desperate character? Was it good or bad?

A. I have heard that it was pretty bad. The neighborhood gave him the name of being a pretty dangerous man.

Q. In what respect was he regarded as dangerous?

A. I heard people talking about the fusses he got in, and that he was very quarrelsome.

Q. Was he regarded as a dangerous, disorderly, fighting man?

A. That was about it, till I moved out here. I don't know what it was afterwards.

Cross-examination:

Q. How old are you?

A. I will be twenty-six the 29th of June.

Q. And you have known Nelson all your life until you came to this county. When did you come here?

A. About four years ago.

Q. So you haven't lived within fifty miles of him in the last four years?

A. No, sir.

John Dinkins sworn:

Q. Where do you live now?

A. In the county.

Q. Did you know James Nelson?

A. I never saw him but once.

Q. You were present with Haga, and saw a difficulty between them?

A. Yes, sir.

German Ashland sworn:

Q. Are you acquainted with James Nelson?

A. Yes, sir.

Q. Are you acquainted with his character; if so, was it good or bad?

A. I don't know as I was particularly acquainted with his character, but it was generally understood that James Nelson was a blackguard.

Q. Was that his general reputation?

A. Yes, sir.

Q. Did he sell liquor?

A. Yes, sir, I reckon so. He offered to sell it to me. I didn't buy of him.

H. J. Grubb sworn:

Q. Did you know James Nelson?

A. Yes, sir; I knew him.

Q. How long have you known him?

A. I expect as much as nine years.

Q. Are you acquainted with his general character?

A. Yes; pretty well acquainted with it.

Q. Was it good or bad; was he a disorderly man?

A. People, generally, said Jim was a pretty bad fellow—rather a dangerous fellow; I never had much to do with him; they said if he got mad he was very dangerous.

Q. Did they say it required much provocation?

A. I believe they said it didn't take much to make him mad.

Q. Do you know of any instance of his shooting anybody?

A. He shot his brother—that was the report.

Cross-examination:

Q. When did you last see James Nelson?

A. I couldn't tell you exactly; I expect it has been four or five years.

William Grubb sworn:

Q. Do you live in the neighborhood of James Nelson now?

A. No, sir.

Q. How far do you live?

A. I live in this county; I have been living here for five years; was at Pocahontas and West Virginia part of the time.

Q. What was his reputation when you knew him?

A. He was said by the people to be a dangerous sort of a man, without much character; but I haven't seen much of him for eight or nine years; I have only seen him a few times during that time.

John Fulton sworn:

Q. How old are you?

A. Going on thirteen years old.

Q. Did you see the shooting between Carrico and Mr. Nelson?

A. Yes, sir.

Q. How far were you off?

A. I couldn't tell, hardly.

Q. Give some idea?

A. I suppose thirty-five or forty yards.

Q. What were you doing at the time?

A. Coming home from school.

Q. What side of the road were you on?

A. On the left-hand side, going yon way.

Q. And in field?

A. Yes, sir.

Q. Were you higher than the road?

A. Yes, sir.
Q. Was anything between you and the road?
A. No, sir.
Q. Any fence?
A. The fences were all torn down.
Q. What did you see about it?
A. I seen Mr. Carrico shoot Mr. Nelson, and he fell.
Q. Is that all you saw?
A. Yes, sir.
Q. What became of you then?
A. I went on home.
Q. Could you hear them talking?
A. Yes, sir; but I couldn't hear what they were saying.
Q. But you did hear talking between them?
A. Yes, sir.
Q. Well, you know you saw Carrico?
A. Yes, sir; I saw him shoot Mr. Nelson, and he fell.
Q. Do you remember hearing Nelson and Carrico both talk?
A. Yes, sir; but I couldn't tell what they said.
Q. Did you see any pistols?
A. No, sir.
Q. Neither in Mr. Carrico's hands or Mr. Nelson's?
A. No, sir.

Cross-examination:

Q. You were in plain view of them, were you?
A. Yes, sir.
Q. And saw both men?
A. Yes, sir; I could see them.
Q. Did you see Mr. Carrico have a pistol?
A. No, sir; nor Mr. Nelson.
Q. You saw Mr. Carrico hold his hand out, and Mr. Nelson fell?
A. Yes, sir; I seen him shoot, and seen Mr. Nelson fall.
Q. You say you were out in the field, higher than the road?
A. Yes, sir.

Q. Did you see Mr. Carrico on a horse?

A. Yes, sir.

Q. And Mr. Nelson on foot?

A. Yes, sir.

Q. How far distant were they from each other?

A. I couldn't tell you that.

Q. Could you see Mr. Carrico plainly?

A. I don't recollect now, I was so scared; I saw them, but I didn't know what I was doing hardly.

Q. Was Carrico plain to you—could you see him plainly as you do me?

A. I can't tell; I don't recollect.

Q. Could you see him as plainly as you see some of us here?

A. No, sir; not as plain as that.

Q. You didn't see a pistol in Mr. Carrico's hand or in Mr. Nelson's?

A. No, sir.

Q. How long had you been looking at them before the shooting occurred?

A. I had just come around from behind some bushes when the shot fired.

Q. Were you going along or standing still when the shooting occurred?

A. Going along slowly.

Jack Hall sworn:

Q. Where do you live?

A. In Wythe (county) now.

Q. Where did you formerly live?

A. In Smyth county.

Q. Were you acquainted with James Nelson?

A. I saw him once.

Q. Had you ever had any acquaintance with him at all?

A. —— ——.

Q. Tell what occurred when you did see him, and if he tried to shoot you without provocation?

A. —— ——.

Q. By Court, interrupting: When was this?

A. Eight or ten years ago.

By Court: Stand aside.

COMMONWEALTH'S EVIDENCE—INDICTMENT AND RETURN PRESENTED.

Reuben Nelson sworn:

Q. Were you with your brother at the time he was shot?

A. Yes, sir.

Q. You and your brother were going along the road?

A. Yes, sir.

Q. Tell the Court what occurred.

A. Me and my brother come along down the road; I had his keg on my shoulder, and this man rode up and said, "What have you got in your keg?" I told him nothing, and my brother said nothing, and he said, "By God, I'm a revenue officer," and at that throwed his pistol up, and I run.

Q. What did your brother say?

A. He told me to go on; that he wouldn't hurt me; and this man said, "By God, I'm a revenue officer," and shot him, and throwed his pistol around at me, and I run.

Q. What did your brother say just before he shot him?

A. He didn't say anything.

Q. Did he ask him any questions?

A. No, sir; none that I heard.

Q. Were you on one side of the road and your brother on the other?

A. No, sir; my brother was just behind me.

Q. You said, didn't you, that you were behind him when he was shot?

A. Yes, sir, I was; but I passed when he said, "By God, I'm a revenue officer," and I turned back and saw he had shot my brother.

Q. So you were in front?

A. Yes, sir; and my brother behind.

Q. Carrico stopped you, did he?

A. Yes, sir; and asked what was in the keg.

Q. What did you say?

A. I said nothing.

Q. What did your brother say?

A. He told me to go on; he wouldn't hurt me.

Q. What did Carrico do?

A. He said, "By God, I'm a revenue officer," and shot my brother, and threw his pistol around towards me, and I *run* down the road.

Q. Is that all?

A. Yes, sir.

Cross-examination:

Q. Did you know Carrico?

A. No, sir; I never saw him before.

Q. Where had you been that day?

A. I don't know; I had never been in that country before.

Q. What were you doing?

A. *He* had a little whiskey.

Q. Did you have any when your brother was shot?

A. No, sir.

Q. All out?

A. Yes, sir.

Q. You never sold any of it?

A. No, sir.

Q. You were with him?

A. Yes, sir; but I don't know what he *done* with it.

Q. Didn't you know about his selling liquor there—at Pierce's?

A. No, sir; I know I was in at dinner.

Q. You were carrying it?

A. Sometimes I was, sometimes he was.

Q. The load got lighter?

A. Yes, sir.

Q. You say your brother said nothing to him?

A. I never heard him say anything.

Q. You were right close?

A. Pretty close.

Q. You ran?

A. Yes, when he throwed his pistol around on me.

Q. You are positive your brother didn't say anything to him?

A. Yes; if he had I could have heard him.

Q. Didn't you well know it was Mr. Carrico?

A. No, sir, I didn't know him at all.

Q. Didn't your brother tell you just before he came up that it was Mr. Carrico?

A. He said to me that there was Carrico.

Q. Didn't you know that Carrico was a marshal?

A. No, sir.

Q. Your brother did inform you that that was Carrico, soon after he came in sight?

A. He said to me that it was him.

Q. When did he tell you it was Carrico?

A. Before he got up to me he said it.

Q. Did Carrico tell you he was a United States marshal?

A. No, sir.

Q. Are you sure he didn't tell you that?

A. Yes, sir.

Q. Your brother told you to go on?

A. He said to go on; he wouldn't hurt me.

Q. Did you go on, and go by this revenue officer, after he told you he was a revenue officer?

A. A little past him.

Q. How far did you pass his horse before he shot your brother?

A. Just a little past.

Q. Did you sell any liquor that day?

A. No, sir.

Q. Didn't sell to R. W. Pierce?
A. No, sir.
Q. Did your brother?
A. I don't know.
Q. He had some at Pierce's?
A. Yes, sir.
Q. William Pierce's?
A. Yes, sir.
Q. Did they get any from you?
A. No, not from me. I was eating my dinner.
Q. You were just simply carrying it around?
A. My brother had hired me to go with him.
Q. How far did your brother live from this place?
A. Eight or ten miles—maybe not so far.
Q. Where did you live?
A. In Grayson county.
Q. Where?
A. Bridle Creek. Part of my things were there and part on Iron Mountain.
Q. Where were you going?
A. Home.
Q. How much liquor had you started with?
A. I don't know how much; I never measured it.
Q. Didn't you start with three gallons?
A. I don't know.
Q. You were selling for him?
A. No, sir,
Q. Do you know A. J. Hubbell?
A. Yes, sir.
Q. Did you tell A. J. Hubbell he hired you to carry three gallons?
A. Not as I remember of.

Re-direct examination:

Q. As I understand, you were met in the road by Mr. Carrico, and you were in front with the sack in which was the keg?

A. Yes, sir.

Q. And your brother was behind?

A. Yes, sir.

Q. After this meeting, could you see what was in your brother's hand?

A. No, sir.

Q. Did you see at any time a pistol in your brother's hand?

A. No, sir.

Q. Did you see a pistol in the hands of Mr. Carrico?

A. Yes, sir.

Q. Did your brother have a pistol with him?

A. Yes, sir.

Q. Didn't he have it buckled on him?

A. Yes, sir.

Q. Did he die with his pistol in his right hand?

A. No, sir.

Q. Where was the pistol?

A. He was lying on his pistol, on his left side.

Q. Did it have a scabbard?

A. Yes, sir.

Q. You came after you run?

A. Yes, sir.

Q. He fell on his left side?

A. Yes, sir.

Q. His pistol under him?

A. Yes, sir.

Q. Inside the scabbard?

A. Yes, sir.

Q. Did you put that pistol back under him after he was shot?

A. No, sir.

Q. Did you even touch him until Wampler and Hawkins came up?

A. No, sir.

M. B. Wampler sworn:

Q. How far do you live from the place where Nelson was killed?

A. About a quarter of a mile.

Q. Did you see Nelson the day he was killed?

A. I don't know whether it was him or not; I saw two men going on the road a short time before he was shot?

Q. Did you hear a pistol shot?

A. No, sir.

Q. How long after the shooting was it when you got there?

A. I suppose twenty minutes.

Q. Who was there with you?

A. Mr. Hawkins.

Q. Who was there?

A. Reuben Nelson and the dead man.

Q. What condition did you find deceased in reference to his pistol?

A. It was in a scabbard, under him, on his left side.

Q. Where was the pistol?

A. Under his left hip.

Q. Was it fastened securely?

A. I didn't notice.

Q. Deceased was dead when you got to him?

A. Yes, sir.

Q. You and Hawkins got there together?

A. Yes, sir.

Q. Where is Hawkins?

A. At home, I think.

Q. Sick, is he?

A. I think so.

Q. I understand that you lived a quarter of a mile from the place where he was killed?

A. About that, sir.

Q. What called your attention there?

A. Some of Hawkins' folks called to me there was a man shot down there.

Q. How long did it take you to go there?

A. Five or ten minutes—about that.

Q. Did you examine his body?

A. No, sir; I never had my hands on him.

Q. Did you find his pistol belted around him in its scabbard?

A. I saw the pistol was cocked; I did notice it particularly.

Q. Did you see anybody else as you went to the place?

A. No, sir.

Q. How did you go?

A. Pretty fast.

Q. There was nobody else there but you two, the dead man and his brother?

A. That is all I saw.

Q. How long before P. Bennington got there?

A. About one-half hour.

Q. Was the body moved until then?

A. No, sir.

Cross-examination:

Q. I understand the man had been killed twenty minutes when you got there?

A. Yes, sir.

Q. You don't know what Rube did with that pistol until you got there?

A. No, sir; I don't know anything about it.

Alex. Bennington sworn:

Q. How long until you got there?

A. About one-half hour.

Q. How far were you from where he was killed?

A. I expect something like half a mile.

Q. You went pretty fast to the place?

A. I ran part of the way.

Q. What was the condition of affairs as to the body when you got there?

A. It was buckled around him in the scabbard, and the flap down over it.

Q. Who did you find there?

A. There were several there who had come up. I think some women were there, some men, and some boys.

Q. Much of a crowd?

A. Right smart little crowd.

Q. Did you make any examination after you went there?

A. No, sir—not except I stood and looked at him.

Q. Will you tell the Court the position in which the body was lying?

A. Over on his back like, his right foot lying over the wagon track, right hand over that way [showing], and his left hand over that way [showing].

Q. The pistol was underneath the body?

A. Yes, sir, in a scabbard.

Q. His brother had been there all the time?

A. Yes, sir.

Cross-examination:

Q. He had ample time to put the pistol back into the belt, and buckle it securely in the belt?

A. Yes, I suppose so he did.

By the Court:

Q. What kind of a pistol was it?

A. I don't know, sir; I never took it out of the scabbard.

J. J. Bennington sworn:

Q. Do you know the prisoner?

A. Yes, sir.

Q. You remember the killing of James Nelson, do you?

A. Yes.

Q. Did you see him (prisoner) on that day?

A. Yes, sir.

Q. What time that day?

A. In the evening.

Q. Do you know where this homicide occurred?

A. Yes, sir.

Q. How far were you from there?

A. I can't say, exactly. It must be half a mile.

Q. You were going in one direction and he the other?

A. —— ——

Q. Did any conversation occur between you?

A. Yes, some little.

Q. What was it?

A. I was at the house, and he came along and hollowed, "Hello," sorter jerked his horse, and then went on again. I said, "Hold on, Joe; I want to speak to you," and he turned his horse and kinder jerked him up, and drew his pistol out of his scabbard and held it in his hand, and I said, "Hello" or "Hell-fire, Joe," or something of that kind, "Don't you know me?" and he said, "I do know you; it is John Bennington." I said, "Yes," and he come on then towards me and got up tolerably close, and I said, "I am all right," and he said, "How are you?" and said, "I feel mighty bad; I have got something like grippe and can't hardly talk," and says, "Have you got any whiskey; I haven't got any at all," and says, "Do you know where a fellow could get a drink," and said he had a little, but took the last bit right back here; said, "There was a corn-shucking over here, and they had given me a drink or two there," and I said, "I saw two fellows pass up the road that I thought had some," and said, "You must have met them"; and he said, "No, I didn't see anything of them."

Q. How far was this from where this man was killed?

A. It must have been a half a mile or a little more. I don't know exactly.

Q. He spoke of having had some liquor that morning?

A. He said he had had a little, but had drank it up back there.

Cross-examination:

Q. You say you had been at a corn-shucking?

A. Yes, sir.

Q. And told him some fellows over there had some liquor?

A. I said they had given me a couple of drinks, and I told him, too, that there were some fellows going up the road with some, I thought, and if he rode fast he would overtake them; that they passed about fifteen or twenty minutes ago.

Q. You had had some that day?

A. I had that I got at the corn-shucking.

Q. What man was it that gave it to you?

A. Mat Bennington.

Q. He was the man that was having the corn-shucking?

A. Yes, sir.

Q. Did you get any from these men that went up the road?

A. No, sir; I didn't see them.

Q. Who told you?

A. Tom Wilkinson.

Q. Did you tell Carrico this?

A. Yes, sir.

Q. What did you tell him?

A. He asked where he could get some whiskey, and I wanted to know if he had met them.

Q. Did you want some whiskey, too?

A. Yes, sir.

Matt. Bennington sworn:

Q. This corn-shucking that has been spoken of was at your house?

A. Yes, sir.

Q. Was this other Bennington at your house that day?

A. Yes; shucking corn in my field; after twelve o'clock we got done.

Q. Did you give him some whiskey?

A. Yes, sir.

Q. Where did you get that whiskey?

A. At Mt. Airy, twelve miles west of the Blue Ridge mountains.

Q. You didn't get it from these Nelsons, then?

A. No, sir.

Q. Did you know these Nelson boys?

A. I got acquainted with Jim Nelson about five years ago—about the time Pete Harvey was killed. He came into my harvest field five years ago this spring, and wanted me to hire him to do harvesting, and I told him I had plenty of hands, and he commenced talking about the Harvey murder. I saw him passing frequently afterwards. He come to my house once and wanted to stay all night. He stayed there all night, and he harvested half the next day, and I paid him fifty cents for it, and he went on.

Q. Did you see Carrico that day?

A. No, sir.

J. B. Huffman:

Q. Did the prisoner stay with you just before the homicide?

A. Yes, sir.

Q. The night before?

A. Yes, sir.

Q. Stayed all night at your house?

A. Yes, sir.

Q. Did you tell him there that Nelson passed your house selling liquor?

A. No, sir.

Cross-examination:

Q. There was some talk between you and Carrico about selling liquor, was'nt there?

A. No more than I told him some blockaders were passing through the country there.

Q. Did you say anything about blockaders being on the road?

A. I merely mentioned to Carrico that there were blockaders going through the country.

Q. Did you talk with Carrico about the blockaders' business through that country?

A. Yes, sir.

Re-direct examination:

Q. Did you tell him that Nelson was going through there?

A. No, sir.

J. D. Phipps sworn:

Q. It is testified by the prisoner that he took dinner with you at your house the day of the homicide.

A. Yes, sir, I think so.

Q. Tell what occurred there, and what was his condition.

A. He stopped at my house to get his dinner, and he was under the influence of liquor.

Q. There is no doubt about that?

A. No, sir.

Q. Did he exhibit his pistol?

A. Yes, sir. I was at the barn when these gentlemen stopped, and Carrico said they had stopped to get some dinner: said he had had no breakfast, and wanted something to eat. I told him my wife was gone to church, but I would see if I could give him anything, and then said I had some cold victuals. After dinner he talked a great deal about being a fine shot, and said he was a dangerous man, and says, "I will show you my pistols," and he took them out, and says, "I am a very dangerous, passionate man," and was handling his pistols around; and I said, "If that is the case, I would rather see the other ends of the pistols—he had them pointing every way—and he said, "All right."

Q. What did he say about the accuracy of his shooting?

A. He bragged on his pistols, and said he could take one of them and knock a dime down set in the middle of the road.

Q. That was his fine pistol?

A. Yes, I reckon it was; I didn't pay much attention to

that. He kept pointing it towards me, and I said, "Mr. Carrico, turn it around." I was noticing that more than the pistol.

Q. What about the other one?

A. That was a shorter pistol.

Q. Who was this other man with him?

A. He said he was his prisoner.

Q. Where was he taking him?

A. Grayson Courthouse.

Q. You saw him a few minutes after he came to your house for dinner?

A. It was some few minutes before I came from the barn—maybe not over five or ten minutes; I didn't pay any attention to the time.

Q. You say he was under the influence of liquor?

A. Yes, sir.

Q. What does under the influence of liquor mean?

A. I considered him very tight.

Q. Did he act like a drunken man?

A. He talked like one.

Q. Carrico behaved very noisily?

A. Yes, sir.

Q. Is it not one of the indications—talking very freely?

A. Yes, sir.

Q. He bragged about his pistols and the accuracy of his shooting?

A. Yes, sir.

Q. And exhibited his pistols?

A. Yes; two pistols.

Q. Did you know the man with him was his prisoner?

A. No, sir; I didn't know at first—not until the time they left there.

Q. In doing this bragging and handling these pistols, did he do this at your house for the purpose of impressing his prisoner and scaring him, or was it just bravado—how was it?

A. I don't know, sir; he seemed to be directing himself to me.

Q. Who was in the room?

A. Just the three of us.

Q. Do you think he was talking through you for the benefit of the prisoner?

A. Yes; I think so, though it seemed at the time he was addressing himself to me.

Q. He understood what was said—this conversation?

A. I suppose he did.

Q. How far was this from where the killing took place?

A. Somewhere about sixteen miles—somewhere about that.

Q. Do you live in Smyth county?

A. No, sir; I live in Grayson.

Q. How far from Independence?

A. Six miles north of Independence. He said he was going there, and took the man and road on away from my house.

Q. Can you fix the hour they had dinner?

A. That was about ten o'clock, I think.

Cross-examination:

Q. You live six miles north of Independence?

A. Yes, sir.

Q. Ten o'clock *was day you fix* for Carrico being there for dinner?

A. Yes, sir.

Q. Nelson was killed at four o'clock in the evening. This was about six hours before?

A. Yes, sir; I suppose so.

Q. Didn't you tell him that you had a pistol?

A. Yes, sir; after he showed me his.

Q. Was there any bravado about you?

A. No, sir.

Q. This conversation there about this *pistol* of his and your pistol, was there at your house?

A. Yes, sir.

Reuben Nelson recalled for prisoner:

Q. Do you know this man Galliger?

A. I seen him once before.

Q. Do you know Stephen Grubb?

A. I seen him once.

Q. Didn't you tell these two gentlemen at Grubb's house that your brother told you as soon as you saw Carrico that he had a good Winchester, and that he would take care of Carrico?

A. No, sir.

Q. You didn't state in the same conversation that you had gone on, and didn't know what took place between your brother and Carrico?

A. No, sir.

M. D. Galliger called and sworn for prisoner:

Q. Did you have a conversation at Grubb's house, a short time after this shooting, with Reuben Nelson, in which he stated that Jim told him to go on; that he had a good Winchester, and he would take care of Carrico?

A. No, sir; not exactly.

Q. What was said?

A. He told me and Steve Grubb he knew that his brother had a good Winchest r pistol with him, and that he said this man Carrico was a "revenue." I won't be positive, though, whether he said his brother told him he had the Winchester, or whether he said he knew he had it, but he said his brother told him to go on, and he did, and didn't know what occurred between this man Carrico and his brother.

Cross-examination:

Q. Did he say he didn't see him draw his pistol and shoot his brother?

A. Yes, sir; that is what he told me; but he said the man threw his pistol around, and he run.

Steven Grubb sworn for prisoner:

Q. Tell what occurred—what this man said at your house?

A. We were talking about this case. Galliher was at my house, and we were talking with Rube Nelson about it, and he said "he and his brother were coming along, and that he was in front and seen Carrico coming, and said, "Jim, yonder comes Carrico"; and Jim said, "Yes, it is him," and he told him to go on; that he wasn't going to hurt him; that Carrico come on up and pulled out his pistol and shot his brother, and threw the pistol around towards him, and he run."

Q. Was anything said about a Winchester pistol?

A. He said he knew his brother had a pistol.

Q. And his brother told him it was Carrico?

A. Yes, sir.

United States District Court for the Western District of Virginia: In the Fourth Circuit, at Abingdon, Va.:

I, I. C. Fowler, clerk of the District Court of the United States for the Western District of Virginia, in the Fourth Circuit, at Abingdon, Va., *do* hereby *certify* that *the foregoing is a full and true transcript of the record and proceedings of said court* in the case of *Joseph H. Carrico, Petitioner*, vs. *W. D. Wilmore, Jailer of Smyth County, Virginia*, removed from the County Court of Smyth county, Virginia.

Given under my hand and the seal of said court, this 28th day of June, A. D. 1892.

I. C. FOWLER, Clerk.

[Seal.]

148 U.S. 107

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JAMES H. McKENNEY,
CLERK.

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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

NO. 7, ORIGINAL.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA, PETITIONER.

PETITION FOR MANDAMUS.

BRIEF IN OPPOSITION TO THE MOTION FOR THE WRIT.

WM. A. MAURY,
Assistant Attorney-General
and Counsel for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1892.

NO. 7, ORIGINAL.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA, PETITIONER.

PETITION FOR MANDAMUS.

BRIEF IN OPPOSITION TO THE MOTION FOR THE WRIT.

This is an application by the Commonwealth of Virginia for the writ of mandamus to compel the Hon. John Paul, judge of the district court of the United States for the western district of Virginia, and, as such, judge of the circuit court of the United States for the said district, to remand to the court of the county of Smyth, Va., the case of the Commonwealth of Virginia *v.* Joseph H. Carrico, being an indictment for murder, found by a grand jury in attendance upon the court of Smyth County, which was removed from the county court into the circuit court of the United States by order of the said John Paul, judge as aforesaid, and also to remand to the custody of the jailer of Smyth County the body of the said Carrico, the custody of which was, by order of the

same Judge, transferred from the custody of the jailer of said county to that of the marshal of the United States for said district.

A rule was laid on Judge Paul to show cause why the writ of mandamus should not issue, as prayed, and he has shown cause, averring, in his answer to the rule, jurisdiction of the case in the circuit court of the United States, and praying that the rule may be discharged and the petition of the commonwealth dismissed, with costs.

JURISDICTIONAL FACTS.

On December 11, 1891, Joseph H. Carrico, then, *and now*, a deputy marshal of the United States for the western district of Virginia, was on his way, with a prisoner in custody, from Independence, in Grayson County, to Marion, in Smyth County. After crossing Iron Mountain he was informed that two men named James and Reuben Nelson were engaged in the unlawful possession and selling of whiskey in violation of the internal revenue laws of the United States. Very soon after hearing this, Carrico met these very men in the road, *one of them carrying a keg*, whom he thought he recognized from the description of them he had just received, and asked them what they had. The man with the keg replied, "a little whiskey or liquor," but the other one, James Nelson, asked "who in the hell" he, Carrico, was, and on receiving the reply, "I am a United States deputy marshal," immediately "went back and got his pistol out of the scabbard and said, 'no damned marshal shall arrest me.'" Then and thereupon, Carrico, who, with his prisoner to look after, had

had his pistol in his hands all the way from Independence, hearing the other pistol cock, shot and killed the man who, to all seeming, was in the act of attempting his life, and who had been represented to him as a "dangerous man" (pp. 42, 43). To use Carrico's own words, "when I shot, he was cocking his pistol in the biggest rush I ever saw"(p. 57).

This is, substantially, Carrico's account of the occurrence, and it is corroborated by the testimony of his prisoner, George Findlay (p. 54).

The learned judge, whose act in assuming jurisdiction of the indictment against Carrico is now in question, thus presents, in his opinion, a summary of the facts, as presented in the testimony.

> That the petitioner was a deputy marshal; that on the 11th day of December, 1891, he was on his way from Independence, Grayson County, Va., with a United States prisoner in his custody, taking said prisoner to the jail of Smyth County, Va.; that on his way he learned that some men were selling liquor unlawfully in the neighborhood, and he was told that he would probably meet said men on the road; that from what he learned he supposed these men to be the two Nelsons; that after receiving this information he had not gone more than a mile when he met two men on the highway, who proved to be the two Nelsons; that one of them was carrying a keg, and that he said to them, "It is reported to me that you are selling liquor, and I want to see what you have got there in that keg, and who are you?" that the man with the keg answered, "a little whisky;" that the deceased said to petitioner, "Who the hell are you?" and that petitioner replied, "I am a deputy marshal"; that the deceased then said, "No damned deputy marshal shall arrest me," and drew his pistol; that at this point the petitioner, having his pistol in his hand, fired and killed the deceased.
>
> It is clearly proved that James Nelson, the deceased, and his brother, Reuben Nelson, who was with him at the time he was killed, had been engaged only a few hours before in selling liquor unlawfully; that Reuben Nelson, when asked by the petitioner what he had in the keg which he was carrying, replied that he had "a little whisky." These men having been engaged in selling whisky during the day 10 or 15 miles from their home, and acknowledging that they had whisky in a keg at the time they were accosted by the deputy marshal, the fair presumption

is that they had said whisky "for the purpose of selling the same in fraud of the revenue laws," thus bringing their offense within the provisions of section 3452 of the Revised Statutes of the United States.

It is further shown by the evidence that the petitioner had been informed, but a few minutes before he met the deceased and his brother, that unlawful sales of liquor had been made that day at a corn-shucking in that immediate neighborhood and on the road which the petitioner was traveling with his prisoner, and that he would probably meet the men who were selling the liquor; that when he met the two Nelsons he supposed (the evidence shows that he was correct) that they were the persons who had been selling the liquor unlawfully. So, seeing the keg which one of them carried, and being informed that it contained whisky, the petitioner was authorized to arrest these persons without warrant for a violation of the provisions of section 3452 of the Revised Statutes of the United States (pp. 16 and 17).

ARREST AND INDICTMENT BY STATE AUTHORITY.

Carrico was arrested and committed to jail on the charge of having murdered James M. Nelson, by virtue of a warrant issued by a justice of the peace of Smyth County, and was promptly thereafter indicted by a grand jury of the county court of said county (pp. 6–9).

HABEAS CORPUS AND REMOVAL.

In this state of things, Carrico, on December 18, 1891, addressed a petition to Judge Paul, as judge of the United States circuit court for said district, for the removal of the proceedings against him in the court of Smyth County into the said circuit court, and for a *habeas corpus* to remove his body from the custody of the jailer of Smyth County to that of the marshal of the United States for said district.

The petitioner alleged as the ground of his application that the act for which he had been arrested and was then in jail was done—

In his own necessary self-defence while engaged in the discharge of the duties of his office as deputy marshal, in arresting a violator of the internal-revenue law, the said James Nelson, deceased, who had in his

possession at the time and was selling illicit ardent spirits in violation of the internal-revenue laws of the United States; and petitioner was acting by and under the authority of the internal-revenue laws of the United States, and that what he did was done under and by right of his office, to wit, as deputy marshal, in enforcing the internal-revenue laws of the United States.

The petition further averred that it was petitioner's duty to arrest all violators of the internal-revenue laws and to seize all illicit packages and kegs of illicit spirits, and that, while petitioner was attempting to enforce the revenue laws as deputy marshal, as aforesaid, he was assaulted with a loaded pistol by Nelson, the deceased, who was accompanied by his brother, and that petitioner shot and killed the deceased in self-defense as an officer executing the law.

The petitioner claimed the right both to the removal of the proceedings and his person from the State to the Federal jurisdiction by virtue of section 643, Revised Statutes of the United States (pp. 2 and 3).

Judge Paul had the prisoner brought before him on *habeas corpus* and admitted him to bail at a special term of the district court held on December 23, 1891 (pp. 4–10), and at the same time adjourned further proceedings to a special term of the said district court to be held January 8, 1892.

ORDER OF REMOVAL.

On January 12, 1892, Judge Paul, holding a special term of the district court as aforesaid, entered an order removing the said case from the county court of Smyth County to the circuit court of the United States for the said district, and recognized the accused in the sum of

$1,000 to appear before the said circuit court on the first day of the next regular term thereof "to answer the indictment found against him by a grand jury of the county court of Smyth County, Va." (p. 12).

ALLOWANCE OF APPEAL TO THIS COURT.

Afterwards, on May 14, 1892, the above order was amended, *nunc pro tunc*, by allowing an appeal to the respondent in the *habeas corpus* proceedings, W. D. Wilmore, jailer of Smythe County (p. 13).

It appears by the record of the removed case that, at May term, 1892, of the circuit court of the United States for the western district of Virginia, Carrico was tried and convicted of voluntary manslaughter, and that at the same term the verdict was, on the prisoner's motion, set aside and a new trial granted, and that in these proceedings the Commonwealth of Virginia was represented by the attorney-general, Hon. R. Taylor Scott, and A. M. Dickinson, esq., Commonwealth's attorney for Smythe County (Ex. B., pp. 4–6).

ARGUMENT.

As this court said, in *ex parte* Virginia (100 U. S., 341), with reference to its authority to issue the writ of habeas corpus upon the application of a prisoner alleging that he is held without lawful authority under the order of an inferior Federal court acting without jurisdiction, the writ will be issued in favor of liberty, "not to review the whole case, *but to examine the authority of the court below to act at all*" (p. 343).

It is presumed that the same principle must govern this application for a mandamus, and, therefore, that the court will not look further into the proceedings of the court below than will be necessary to enable it to determine whether the case presented to that court was sufficient to attract its jurisdiction.

The application for removal was based on Section 643, Revised Statutes of the United States, which provides as follows:

> When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, * * * the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner. * * *

The section expressly declares that upon the filing of the petition, in the manner and form required, "the cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court."

If, then, the case made in the petition for removal is within section 643, it would seem clear that, when the body of Carrico was transferred to the custody of the marshal, jurisdiction over the criminal proceedings was completely vested in the circuit court. It was so laid down in *Davis* v. *South Carolina* (107 U. S., 597), which is a parallel case to this. "When," say the court, "by virtue of the writ of *habeas corpus*, the prisoner was taken into the custody of the marshal, the jurisdiction of the circuit

court of the United States of his person and of the indictment against him was completely vested, and that of the State courts ceased altogether" (p. 601; see, also, Dennistoun *v.* Draper, 5 Blatch., 336; Wood *v.* Matthews, 2 Blatch., 370; State of North Carolina *v.* Kirkpatrick, 42 Fed. Rep., 689; State *v.* Sullivan, 50 Fed. Rep., 593; State *v.* Hoskins, 77 N. C., 530). Indeed, it may be said to be a feature of all the removal acts that a compliance with their requirements operates, *ipso jure*, a complete transfer of jurisdiction from the State to the Federal court, without the assistance or coöperation of the former. Marshall *v.* Holmes (141 U. S., 589), and cases there cited.

What, then, is the case set up in the petition for removal? The petition (pp. 2 and 3) alleges his arrest on December 12, 1891, on the charge of murdering the said James Nelson, by virtue of a warrant issued by one Kirk, a justice of the peace of Smyth County, and his confinement in the jail of said county.

The petition then avers that the killing was done by petitioner in self-defense, "while engaged in the discharge of the duties of his office as deputy marshal, in arresting a violator of internal revenue, the said James Nelson, deceased, who had in his possession at the time and was selling illicit ardent spirits in violation of the internal-revenue laws of the United States; and petitioner was acting by and under the authority of the internal-revenue laws of the United States, and what he did was done under and by right of his office, to wit, as deputy marshal, in enforcing the internal-revenue laws of the United States."

The prayer of the petition is for a removal of the cause

under section 643 (R. S.), from the jurisdiction of the said justice of the peace and the said county court to the circuit court of the United States for the western district of Virginia for trial, and that a writ of *habeas corpus cum causa* may be awarded, etc.

It is true that Carrico does not state in his petition that he had a warrant or precept for the arrest of the Nelsons or either of them, and, therefore, it will be assumed, as fact, that what does not appear did not exist.

But it can be clearly shown that Carrico, as deputy marshal, had a perfect right to arrest the Nelsons for committing, in his presence, the offense of having in their possession whiskey for sale on which the Government tax had not been paid, and that, aside from his duty and power to arrest, it was his right and duty, under the law, to give information to the proper authority of the United States of the fact that the Nelsons were thus violating a provision of the internal-revenue laws, and, to that end, to question the Nelsons as to the contents of the keg they were carrying.

First, as to Carrico's power to arrest without warrant or precept: The marshals and deputy marshals of the United States derive a large part of their power from section 788 of the Revised Statutes, which is as follows:

> The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

We are thus referred, for the powers of the marshals and their deputies, to the laws of Virginia prescribing the duties of sheriffs and their deputies.

The law of the United States that the Nelsons were in act of violating when met by Carrico was section 3452 (R. S.), which is as follows:

> Every person who shall have in his custody or possession any goods, wares, merchandise, articles, or objects, on which taxes are imposed by law, for the purpose of selling the same in fraud of the internal-revenue laws, or with design to avoid the payment of the taxes imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of taxes fraudulently attempted to be evaded.

This is the law referred to in the petition and there can not be a doubt that the Nelsons were violating it.

If this law had been a law of Virginia a sheriff of that State or his deputy might, beyond doubt, have arrested the Nelsons without a warrant.

According to the law of that State, the offense described in section 3452 is a misdemeanor, which species of offense is defined by section 3879 of the State Code as an offense not punishable with death or imprisonment in the penitentiary, and the court of appeals of the State has recently decided, in the case of *Musgoe* v. *Commonwealth* (86 Va., 443, 447), that any peace officer may arrest for a misdemeanor committed in his presence. The court uses this language:

> By the general laws of the State, which upon this subject are, for the most part, the common law, a constable may, *virtute officii*, without warrant, arrest for felony, or upon reasonable suspicion of felony, and for misdemeanors committed in his presence, and take the offender before a magistrate to be dealt with according to law.

It is true that Carrico was not an officer appointed under a revenue law, but it is also true that he was an officer acting by authority of a revenue law, namely, section 3452 (R. S.). This is clearly established by the case of Davis *v.* South Carolina (107 U. S., 597), where it was

contended by the attorney-general of South Carolina that the plaintiff in error, who had been indicted in a court of that State for murder, was not entitled to remove the case into the United States circuit court under section 643 (R. S.), on the ground that he had committed the homicide while assisting to execute an internal-revenue law as a soldier detailed to aid the deputy marshal, and not as an "officer appointed under or acting by authority of any revenue law of the United States, or any person acting under or by authority of such officer."

In meeting and overturning that argument, the court say:

> The learned attorney-general of South Carolina, who appears here on the part of the State, very properly waives all questions arising in this case which are covered by the decision in *Tennessee* v. *Davis* (100 U. S., 257).
>
> He seeks to distinguish the present case, however, from that upon its circumstances, and claims that Davis was not entitled, by virtue of the capacity in which he was acting, to the benefit of section 643, Revised Statutes, and to that end maintains the proposition that, as that section applies only to an "officer appointed under or acting by authority of any revenue law of the United States, or any person acting under or by authority of such officer," it can not be extended to embrace the case of the United States marshals or their deputies or assistants, even when they are engaged in the service of process issued for the arrest of parties accused of violation of the revenue laws of the United States.
>
> In our opinion the distinction can not be maintained. A marshal or deputy marshal of the United States is, it is true, not an officer appointed under a revenue law; but when engaged officially in lawful attempts to enforce a revenue law by the arrest of persons accused of offenses against it, he is an officer acting under the authority of that law, for it is that law under which is issued the process which constitutes his authority for his official action. There is, indeed, the general law, prescribing the nature of his duties, which requires him faithfully to execute all lawful process placed in his hands for that purpose. But when process, issued under a particular law, is lawfully issued to him for service in executing it, he is acting under the authority of that law, without which the process would not be valid. It is that law which he would be compelled to rely on as his justification if he was sued as a trespasser for executing the process issued for its enforcement. And the protection which the law thus furnishes to the marshal and his deputy also shields all who lawfully assist him in the performance

of his official duty. It is not questioned that Davis was acting in that capacity. It is true he was a noncommissioned officer in the Army, detailed as a guard in aid of the marshal, and acting as one of his posse comitatus; but this was before such service became unlawful by the passage of the fifteenth section of the act of June 18, 1878, c. 263. (Sup. Rev. Stat., 361, pp. 559, 600.)

There is another ground on which Carrico may justify his act: Section 3988 of the Code of Virginia makes it the sheriff's duty "to give information of the violation of any penal laws to the attorney for the Commonwealth," and by virtue of section 788 it became Carrico's duty to give information to the proper Federal authority of the violation of any penal laws of the United States. Having, therefore, every reason to believe that the Nelsons were in the unlawful possession of liquor for the purpose of selling the same, with the intention of defrauding the revenue, it was Carrico's duty to stop and question them with the view of finding out whether they were violating the law, as seemed more than probable from the information that had reached him. In accosting the two men, Carrico was, plainly, in the performance of a duty, which, necessarily, took its source in section 3452 of the Revised Statutes, which, as we have seen, is part of the internal-revenue system of the United States.

To issue the writ of mandamus in this case would be to turn that writ into a writ of error. A recent writer thus lays down the rule which, it would seem, must govern this application:

If any jurisdictional question is *debatable or colorable*, the tribunal must decide it, and an erroneous conclusion can only be corrected by some proceeding provided by law for so doing, commonly called a direct attack. It is only where it can be shown, lawfully, that some matter or thing essential to jurisdiction is wanting, that the proceeding is void, collaterally. (Vantleet's Collateral Attack, section 1, page 3.)

The question sought to be gone into here, in this collateral way, was raised, more satisfactorily, before Mr. Justice Nelson in *Dennistoun* v. *Draper* (5 Blatch., 336) on a motion to remand the case to the State court on the ground that the defendant, at whose instance the case was removed into the Federal court, did not hold the cotton in dispute "as an officer of the revenue laws, or as a person authorized to hold it under the same, but, on the contrary, held it wrongfully and in violation of the rights of the plaintiffs in the property, and that he was simply a tortfeasor."

But the learned judge, after argument by eminent counsel, refused to try, in that irregular, preliminary way, the question of the existence of the fact on which the jurisdiction of the Federal court turned. He said:

> I agree that, if the petition and affidavit, with the certificate of counsel, failed to bring the cause within the act of Congress providing for the removal, it would be the duty of the court, on motion, to remand it; and such order has also, not unfrequently, been entered in cases where it appeared clearly, by the admission of the parties, or otherwise, that they were not within the act of removal. But, in cases where the proceedings are in conformity with the act, the removal is imperative, both upon the State, and the circuit court; and, if the facts are seriously contested, it must be done in a formal manner, by pleadings and proofs, in the latter court. The question of jurisdiction belongs to the Federal court, and must be heard and determined there. The statute is peremptory that "the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court," and "shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein, in the State court, shall be wholly null and void."
>
> It is true that the plaintiff, after the removal of the cause into the circuit court, has no means, according to the course of proceeding in that court, to raise the question of jurisdiction upon the pleadings; and such disability, doubtless, furnishes some plausibility of reason for the hearing of the question upon motion. But this mode of prosecuting it, which must be upon affidavits, oftentimes conflicting and irreconcilable, is most unsatisfactory, and should not be entertained unless from unavoidable necessity, with a view to ascertain the appropriate tribunal to hear and determine the cause. I am of opinion that no such necessity exists in

> this case. On the contrary, the very circumstance that the plaintiffs can have no opportunity to present the question upon the pleadings should and will enable them to avail themselves of the objection to the jurisdiction in any stage of the trial. If, when the evidence is closed, it shall appear that the cause is such as not to come within the cognizance of the court under the act of 1833, it will be its duty to instruct the jury that the court has no jurisdiction of the cause, and to remand it back to the State court.

The same conclusion had been previously reached by Judge Prentiss in the case of *Wood* v. *Matthews* (2 Blatch., 370).

The learned attorney-general of Virginia seems indisposed to recognize the decisions of this court in *Tennessee* v. *Davis* (100 U. S., 257) and the already cited case of *Davis* v. *South Carolina* (107 U. S., 597), for the ground on which the learned judge below assumed jurisdiction of the indictment against Carrico was precisely the same as that on which this court sustained the Federal jurisdiction in the cases just cited. It is too late now to question the power of Congress to provide for the removal from the State courts to the Federal courts of all cases that can be brought within the judicial power of the United States, whether they be civil or criminal. The Federal courts are not foreign courts in the several States. They are there by authority of the States themselves and largely for the purpose of administering State laws, and no valid reason is perceived why a person indicted in a State court for an offense against the State, and relying upon Federal law or authority as his justification for doing the act charged as an offense, should not be allowed to remove the case from the State to the Federal court under a law passed in pursuance of an express grant of the Constitution. Upon this subject the following remarks of Mr. Justice Strong, in *Tennessee* v

Davis (*supra*), may be reproduced here as furnishing an answer to much that is said in the learned Attorney-General's brief about what he is pleased to term Federal invasion of State authority:

> The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to them their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State in tribunals of the General Government grows entirely out of the division of powers between that Government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be) it will not appear strange that even in cases of criminal prosecutions for alleged offenses against a State, in which arises a defense under United States law, the General Government should take cognizance of the case and try it in its own courts according to its own forms of proceeding (100 U. S., 271, 272).

Whether the writ of habeas corpus was issued under section 643 or section 753 (R. S.) is entirely immaterial, for the petition for removal is the means by which the change of jurisdiction was effected, and not the writ of *habeas corpus*.

It is respectfully submitted that no case is presented for the writ of mandamus, and that the rule should be discharged with costs.

WM. A. MAURY,
Assistant Attorney-General and
Counsel for the Respondent.

APPENDIX.

SECTIONS 643 AND 753, REVISED STATUTES.

SEC. 643. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of Title XXVI, "The elective franchise," or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or other process except capias, the clerk of the circuit court shall issue a writ of certiorari to the State court, requiring it to send to the circuit court the record and proceedings in the cause.

When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court, or left at his office by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the State court shall be void. And if the defendant in the suit or prosecution be in actual custody on mesne process therein it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the State court can be obtained, the circuit court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On failure of the plaintiff so to proceed judgment of non prosequitur may be rendered against him, with costs for the defendant.

SEC. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify.

SECTION 3988, CODE OF VIRGINIA.

Every commissioner of the revenue, sheriff, constable, or other officer shall give information of the violation of any penal law to the attorney for the Commonwealth, who shall forthwith institute and prosecute all necessary and proper proceedings in such case, whether in the name of the Commonwealth or of a county or corporation; and may in such case issue, or cause to be issued, a summons for any witness he may deem material, or give evidence before the court or grand jury.

IN THE

Supreme Court of the United States.

No. .....

EX PARTE

IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA, PETITIONER.

EXHIBIT B WITH PETITION.

IN THE

Supreme Court of the United States.

No. .....

EX PARTE

IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA, PETITIONER.

EXHIBIT B WITH PETITION.

THE UNITED STATES OF AMERICA,
Western District of Virginia.

At a Circuit Court of the United States for the Western District of Virginia, begun and held at the court-house in Abingdon, Va., on Tuesday, the 3d day of May, in the year of our Lord one thousand eight hundred and ninety-one.

Present: Hon. John Paul, Judge of the Western District of Virginia.

Among other were the following proceedings, to-wit:

Commonwealth of Virginia *vs.* Joseph H. Canico, } Indictment for murder from Smythe County Court.

IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA FOR THE WESTERN DISTRICT OF VIRGINIA—IN THE FOURTH CIRCUIT, AT ABINGDON, VA.

PLEAS.

Pleas before the Hon. John Paul, Judge of the District Court for the Western District of Virginia, in the Fourth Circuit, at Abingdon, Va., on the 14th day of May, A. D. 1892.

Be it remembered that heretofore the said Joseph H. Canico presented a petition for the removal of the case aforesaid, and herein charging him with the murder of James M. Nelson from the County Court of Smythe county, Va., to the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Va., (and for a writ of *habeas corpus*) to the Judge of the District Court of the United States for the Western District of Virginia, and upon return of W. D. Wilmore, jailor of Smythe county, Va., and upon the hearing of the evidence and arguments of counsel an order was entered in the said District Court of the United States for the Western District of Virginia, on the 12th day of January, 1892, removing the said prosecution of the Commonwealth of Virginia *vs.* Joseph H. Canico into the Circuit Court of the United States for the Western District of Virginia, in the Fourth Circuit, at Abingdon, Va., for further proceedings and trial, and said indictment, with the endorsements thereon, is in the words and figures following, viz:

INDICTMENT.

Indictment *vs.* Jos. H. Canico. }

VIRGINIA, County of Smythe, } To-wit:

Pleas before the County Court of the county of Smythe, at the court-house of the said county, on the 21st day of December, 1891.

Be it remembered that, to-wit: At a County Court, held for the said county at the court-house, on the 21st day of December, 1891, A. J. Harris, foreman, John T. Johnson, Jr., William Edmonds, Thomas F. Pruner, Henry Kegley, S. P. Copenhaver, H. C. Dutton, and Lindsey Bowlin were sworn a special grand jury of inquest in and for the body of the county of Smythe, and having received

their charge, were sent out of court, and after some time returned into court with an indictment against Joseph H. Canico for felony, which, with the endorsements thereon by the foreman, is as follows:

County of Smythe, to-wit:

In the County Court of the said county, the jurors of the Commonwealth of Virginia, in and for the body of the county of Smythe, and now attending the said court, upon their oaths presents, that Joseph H. Canico, on the —— day of December, in the year one thousand eight hundred and ninety-one, with force and arms, and in said county, in and upon one James M. Nelson, *in the place of said Commonwealth*, then and their being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Joseph H. Canico, a certain pistol of the value of four dollars, then and there charged with gun-powder and one leaden bullet, which said pistol, he the said Joseph H. Canico, in his righthand, then and there had and held, then and there feloniously, wilfully and of his malice aforethought, did discharge and shoot off to, against, and upon the said James M. Nelson, and that the said Joseph H. Canico, with the leaden bullet aforesaid out of the pistol by the said Joseph H. Canico, discharged and shot off, as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said James M. Nelson in and upon the left breast of him, the said James M. Nelson, giving to him, the said James M. Nelson, then and there, with leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the said Joseph H. Canico, in and upon the said left breast of him, the said James M. Nelson, one mortal wound, of which said mortal wound, he, the said James M. Nelson, then and there instantly died, and so the jurors aforesaid, upon their oath aforesaid, do say that the said Joseph H. Canico, him, the said James M. Nelson, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder against the peace and dignity of the Commonwealth of Virginia, upon the evidence of Rube Nelson, W. M. Haywood, A. Bennington, William Parks, Creek Henk, M. B. Wamplu, L. C. Parks, witnesses, sworn in open court, and sent to the grand jury to give evidence.

—— ————, Clerk.

Endorsed: A true bill.

A. J. HARRIS,
Foreman.

A transcript from the record.

Teste:

W. C. SEXTON, Clerk.

Endorsed: No. 159.

Commonwealth
vs.
Joseph H. Canico,
} Transcript of Record—Indictment.

1892—May Term: Trial verdict—guilty.
Verdict set aside and new trial granted.
Def. rec., $500 and com.
Filed May 2, 1892.

I. C. FOWLER,
U. S. District Court.
Abingdon, Va.

We, the jury, find the defendant guilty of voluntary manslaughter.

P. L. BARKER,
Foreman.

ORDER TRIAL.

MAY 14, 1892.

And at another day, to-wit:

At a regular term of the Circuit Court of the United States, continued and held in the Fourth Circuit for the Western District of Virginia, at Abingdon, on Saturday, the 14th day of May, 1892.
Present: Hon. John Paul, District Judge, presiding.

No. 159.

The Commonwealth of Virginia, Pl'tf,
vs.
Joseph H. Canico, Def't.
} Indictment for murder from Smythe County Court.

This day came R. Taylor Scott, Attorney-General for the Commonwealth of Virginia, and A. M. Dickinson, Commonwealth's-Attorney for Smythe county, Va., and the prisoner appeared, as required by the term of his recognizance, and being arranged, plead not guilty to the indictment, and a pannel of twenty jurors, summoned by the marshal of this district from the body of the district, were examined by the Court, and sixteen of them found free from all legal exceptions and qualified to serve as jurors according to law; thereupon the accused struck from the said pannel of sixteen, the names of four of said jurors, leaving the following twelve jurors, against whom there was no objection, to-wit: Henry Hounshell, Alexander Cary, J. T. Seay, D. H. Rincer, James C. Yeary, L. D. Estep, B. H. Livingston, P. L. Barker, Pleasant Young, E. F. Price, James H. Hunt, N. L. Crockett, who were sworn the truth

of and upon the premises to speak; and having heard the evidence and a portion of the arguments of counsel, were adjourned until 11 o'clock A. M. on Monday morning next. And thereupon they were given in charge of the marshal of the district to whom, was administered, as well as to his assistant deputy, an oath that he would keep them together without communication with any person; and that he would neither converse with them himself touching this trial, nor permit any other person to do so; and would cause them to appear in this court on Monday morning next at 11 o'clock.

ORDER OF VERDICT.

MAY 16, 1892.

And on another day, to-wit:

At a regular term of the Circuit Court of the United States, continued and held for the Western District of Virginia, at Abingdon, in the Fourth Circuit, on Monday the 16th day of May, 1892.

Present: Hon. John Paul, District Judge, presiding.

159.

Commonwealth of Virginia, Pl'tf, vs. Joseph H. Canico, Def't. } Indictment for murder from the County Court of Smythe county, Va.

The prisoner again appeared at bar, as required by the term of his recognizance, and the jury appeared in court, in charge of the marshal and his assistant, pursuant to their adjournment on yesterday, and being called and found to be all present, after hearing the remainder of the arguments of counsel and the instructions of the Court, retired to their room to consider of their verdict; and afterwards returned into court, having agreed in the following verdict, to-wit:

"We, the jury, find the defendant guilty of voluntary manslaughter.

P. L. BARKER.
Foreman."

And thereupon the prisoner, by his counsel, moved the Court to set aside the said verdict and grant him a new trial, which motion the Court takes time to consider.

ORDER GRANTING NEW TRIAL.

MAY 17, 1892.

And at another day, to-wit:

At a regular term of the Circuit Court of the United States, in

the Fourth Circuit, for the Western District of Virginia, at Abingdon, continued and held as aforesaid, on Tuesday the 17th day of May, 1892.

Present: Hon. John Paul, District Judge, presiding.

159.

The Commonwealth of Virginia, Pl'tf, vs. Joseph H. Canico, Def't. } Ind't for murder from Smythe County Court.

This day came again the parties by their attornies, and the Court being fully advised, it is ordered that the verdict of the jury, rendered yesterday in this case, be set aside and a new trial granted; and on motion of the attorney for the United States, it is ordered that the prisoner be recognized for his appearance before this court on the first day of the next regular term thereof.

Then came the prisoner aforesaid, Joseph H. Canico, who acknowledged himself indebted to the United States in the sum of five hundred dollars in a recognizance, conditioned according to law, for his personal appearance before this court on the first day of the next regular term thereof, to answer further to this indictment, and not to depart without leave thereof; and this case is continued till the next regular term of this court.

CERTIFICATE.

UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF VIRGINIA—IN THE FOURTH CIRCUIT, AT ABINGDON, VA.

I, I. C. Fowler, clerk of the Circuit Court of the United States for the Western District of Virginia, in the Fourth Circuit, at Abingdon, Va., do hereby certify that the foregoing is a full and true transcript of the record and proceedings in said court in the case of

The Commonwealth of Virginia vs. Joseph H. Canico. } Upon an indictment for murder removed from the County Court of Smythe county, Va.

Seal of the Court.

Given under my hand and seal of said court this 28th day of June, A. D. 1892.

I. C. FOWLER,
Clerk.

No. 110
Lovell Mfg. Co. } p. 839.
v.
Cary & Moen.

FIG. 7.

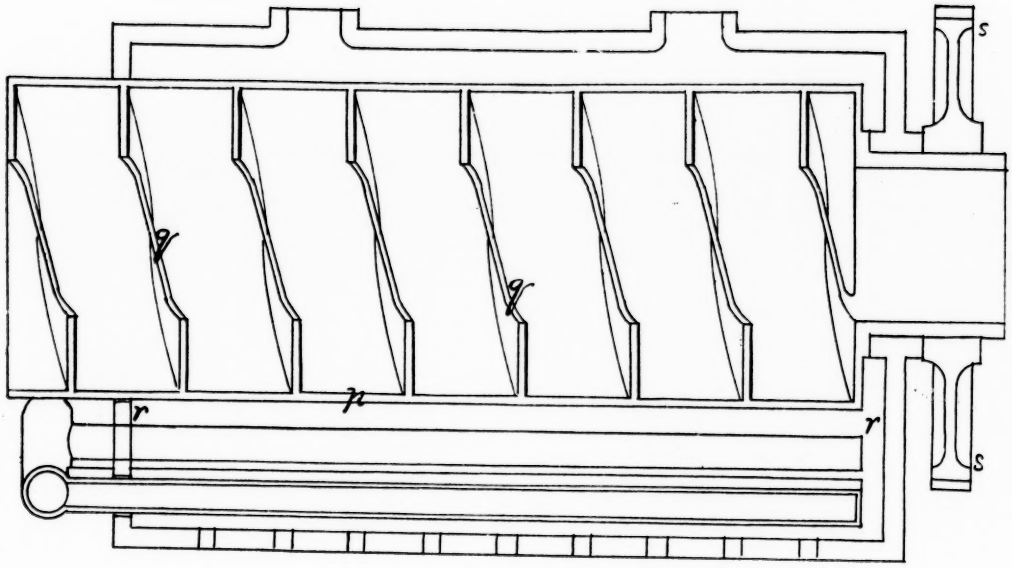
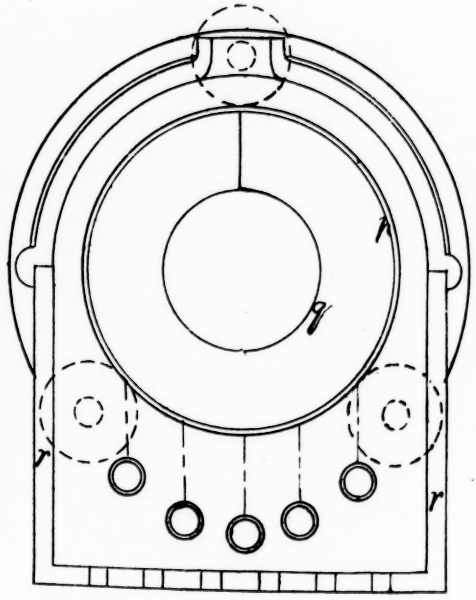


FIG. 8.



Whypall & Porritt,
Tempering Springs.

No. 58 031

Patented Sept. 11, 1866.

No. 110
Lovell Mfg. Co.
Cary & Moen.
} p. 852.

Fig. 2.

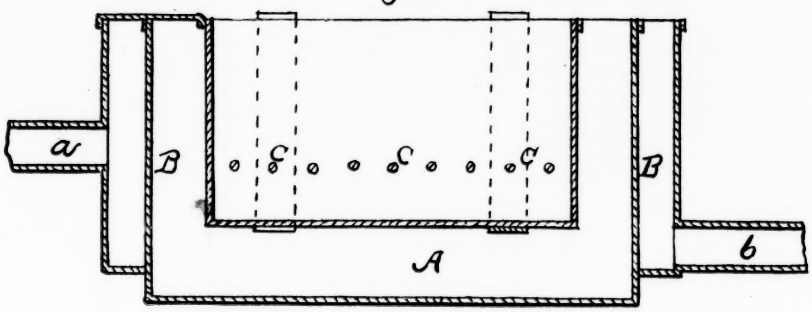
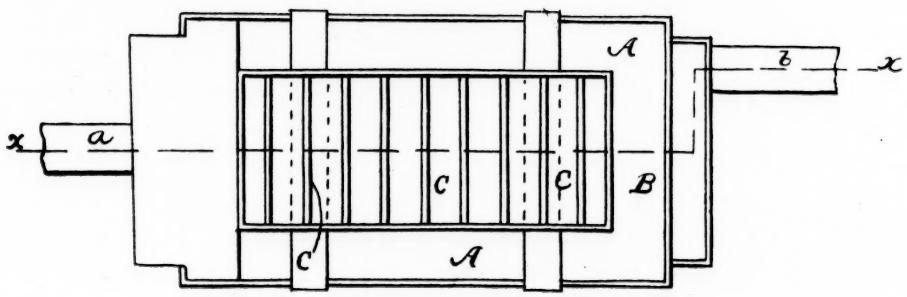


Fig. 1



(No Model)

M. N. Lovell.

Process of Tempering Wire Springs &c

No. 315,424. Patented Apr. 7, 1885.

Fig. 2.

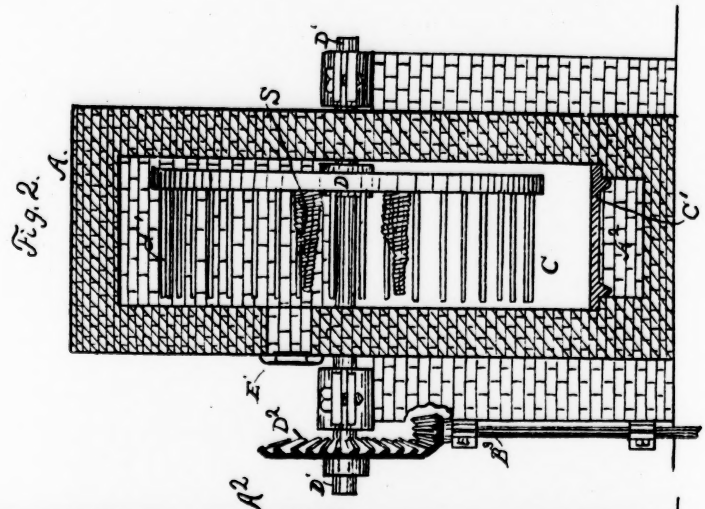
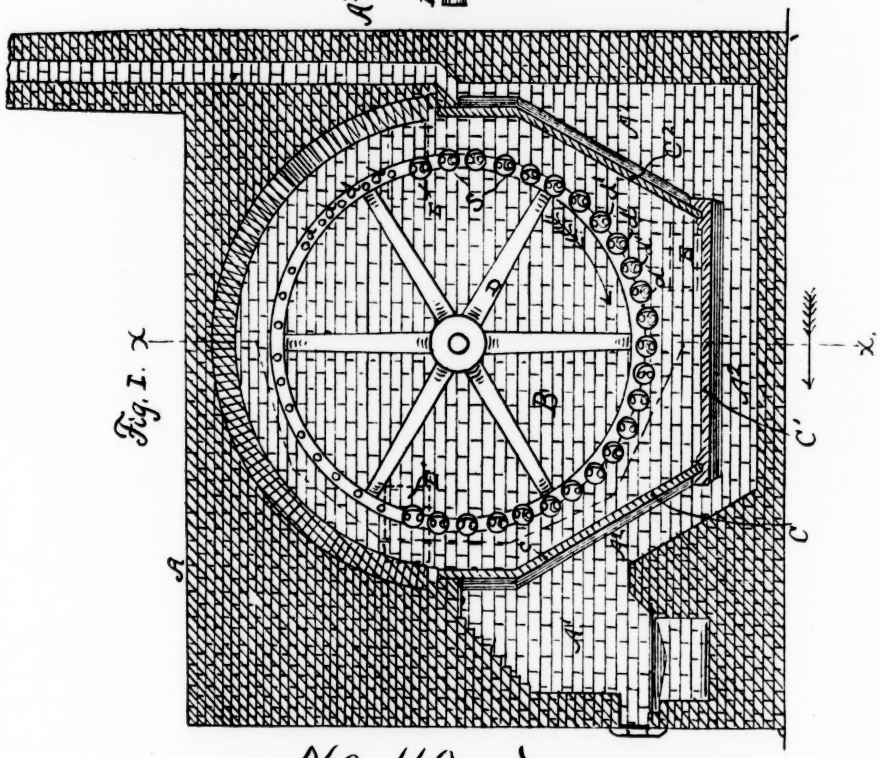


Fig. 1.



No. 110
Lovell Mfg. Co. } p. 857.
Cary & Moen.

Cylinder Stove, and Oven, 1864 to 1870.

No. 110.
Lowell Mfg. Co.
Cary v. Morse. } p. 858.

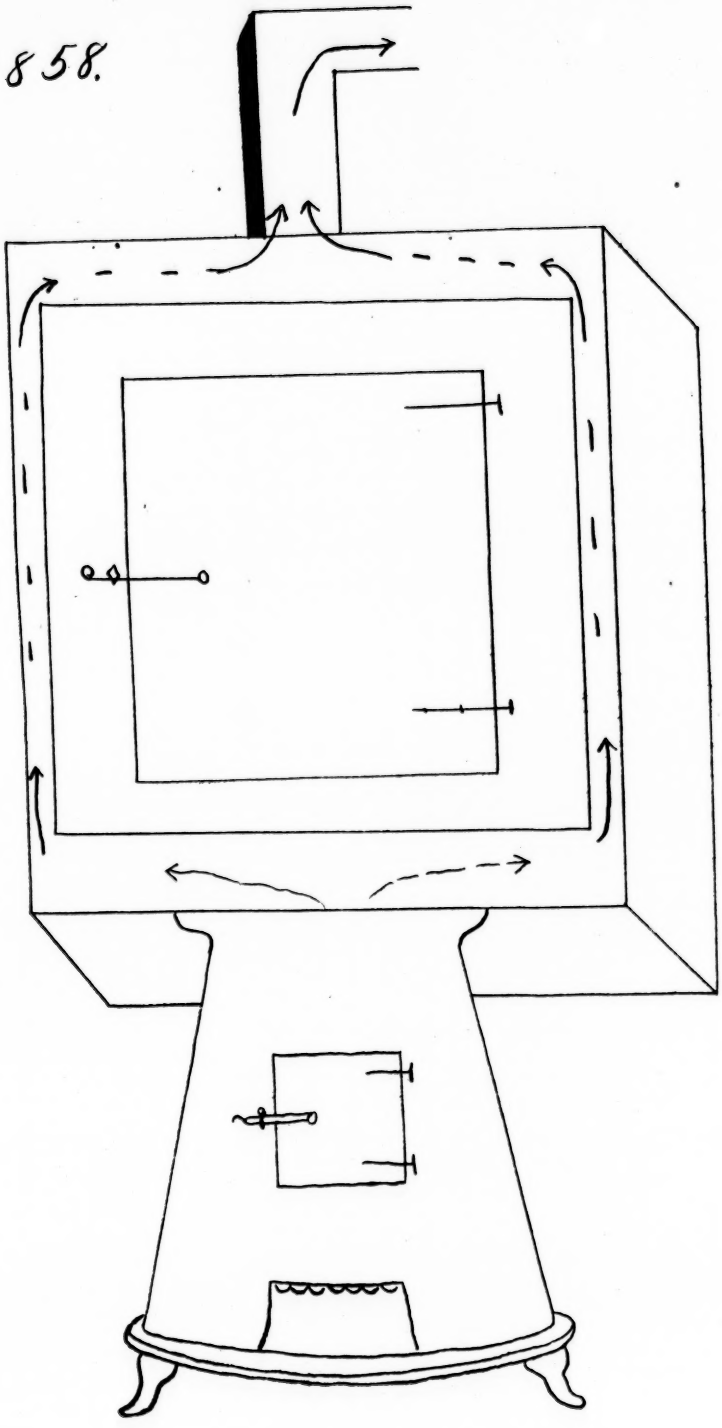
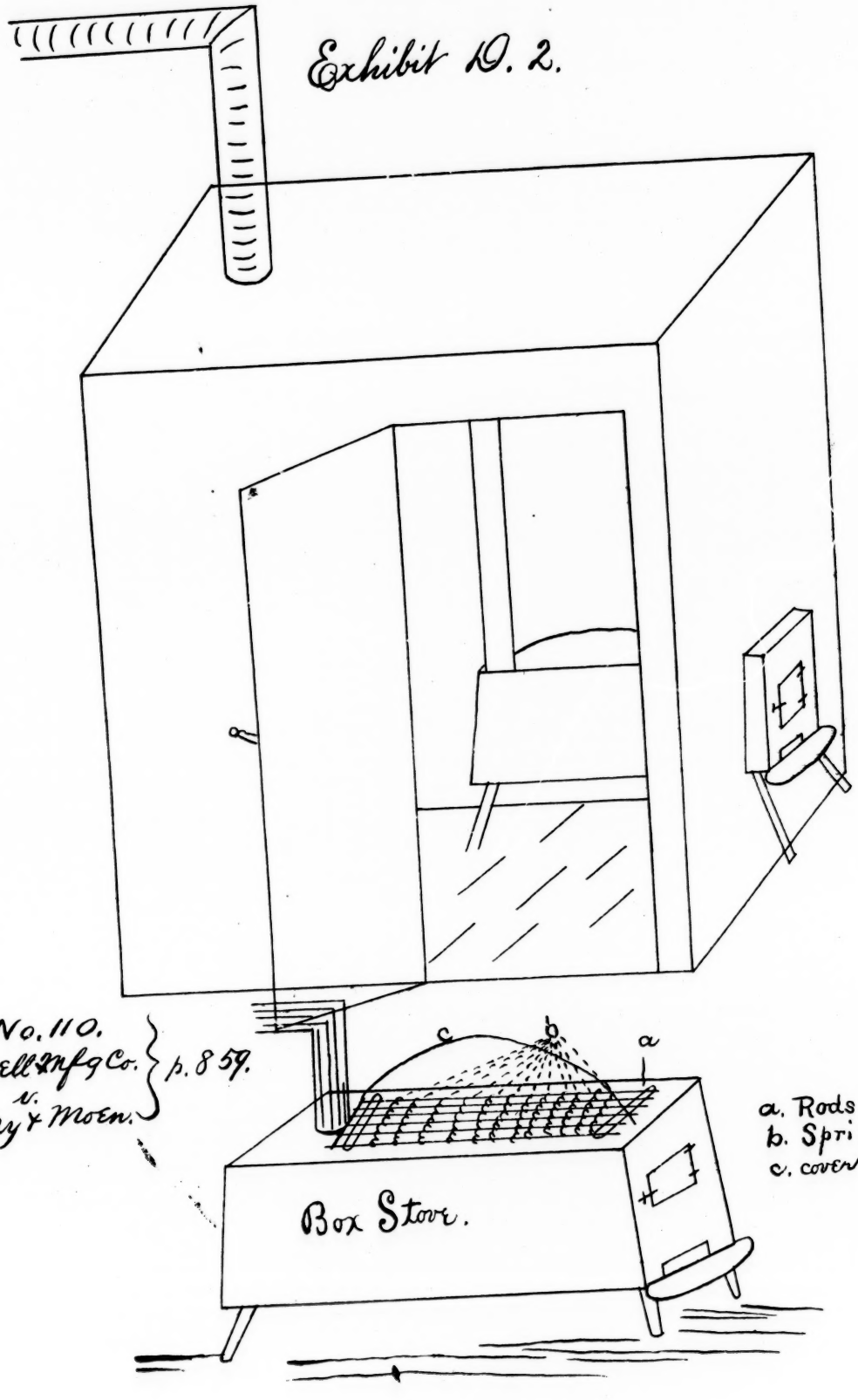


Exhibit. D. 1.

Box Stove and Oven used in 1870 and after.

Exhibit D. 2.



No. 110.
Lovell Mfg Co.
v.
Cary & Moen.
} p. 859.

a. Rods.
b. Springs
c. cover for springs

Spring Holder, 1871.

No. 110
Lovell Mfg. Co
v.
Carey & Morn
} p. 860.

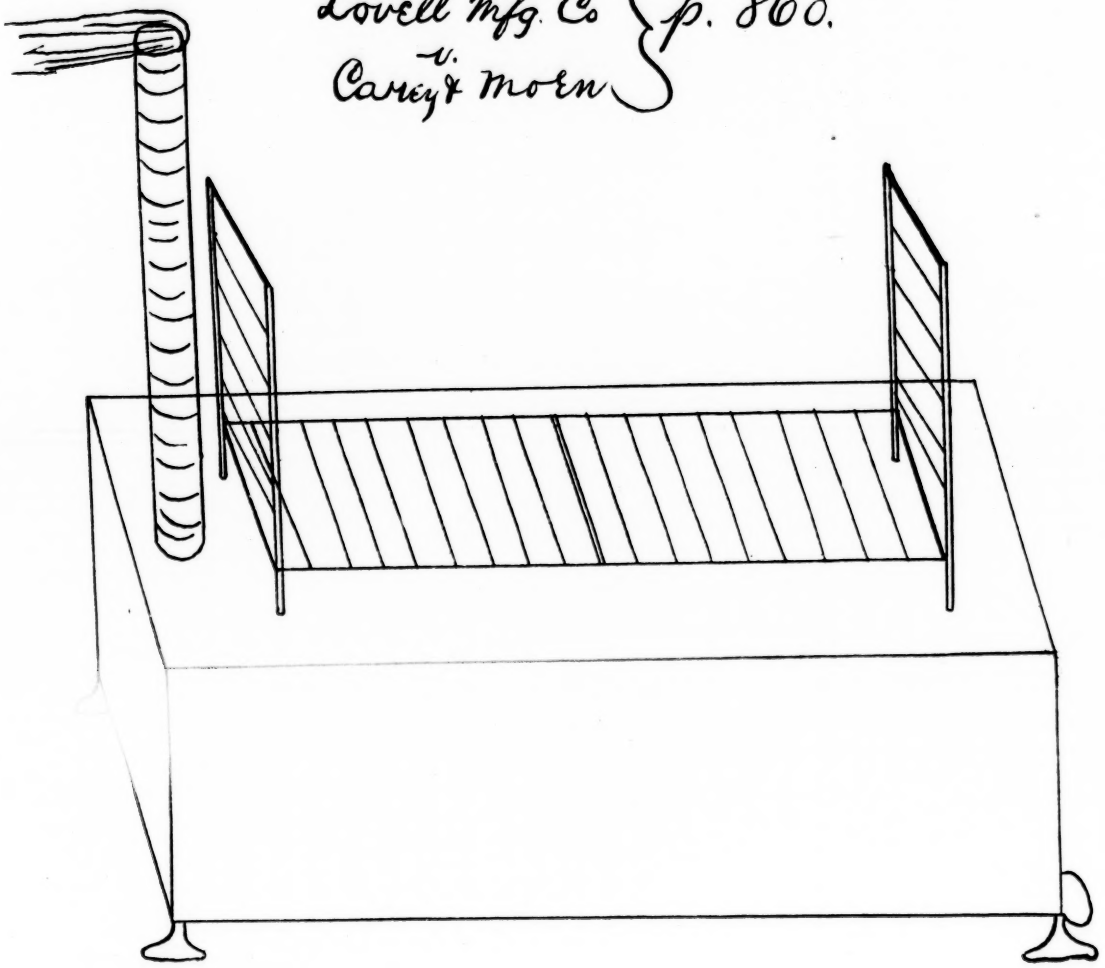


Exhibit A. 3.